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The Madras Law Journal Reports

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the Supreme Court of Seychelles].

Present :—Lords Dunedin, Shaw and Moulton and Sir Samuel Griffith.

Louis Edouard Lanier ... *Appellant*

v

The King ... *Respondent.*

Appeal to Privy Council—Criminal Case—Embezzlement—Civil and Criminal responsibility—Distinction between—Inability to produce money—Not proof of fraudulent intent—Guilty Mind—Necessity for conviction—Practice —Costs directed to be paid by Crown.

By a power of attorney executed by the guardian of certain minors, the appellant was given ample power to act in the collection and investment, either with or without security, of the properties of the minors. Acting under the power certain funds were received and remittances of money were from time to time made by Messrs. Lanier & Co., the firm of which the appellant was a partner. No objection was at any time taken to this course by the guardian or the minors. On the other hand the guardian's sole anxiety was that a high rate of interest should be obtained and this was done. The firm's interposition was highly in the interests of the minors.

In November 1910 a sum of money became payable from one C. Payment was made of this sum by crediting the amount to the appellant's firm in their account with C's banker, which had been overdrawn. No concealment of any kind was practised. The amount was credited to the minor's account and advances were made as usual. On 20th June 1911, the appellant was called upon to give proper security for the amount remaining to the credit of the minors and time was given for the purpose. Within that time appellant gave security. Nevertheless criminal proceedings were instituted against him for embezzlement and he was convicted. The ground on which he was convicted was that though he did not wish to prejudice the minors, "it was his duty to take such precautions and to have exercised such foresight as would not have involved him in the possibility of causing prejudice to the minors" and that "the wilful and fraudulent intent resulted from the fact that the accused so used the moneys that he was unable to produce them, when called upon."

Held: That the judgment appealed against had not kept the distinction between civil and criminal responsibility sufficiently in view, that the facts did not on any just or legal view warrant a conviction for embezzlement and that the appeal came within the rule in *Dillet's Case*[1].

Looking to the exceptional nature of the case, their Lordships directed the Crown to pay the appellant's costs of the appeal.

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1. (1887) 12 A. C. 467.

Mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as, while preserving the amplest civil responsibility, to prevent the third or Criminal category from being extended to mistaken though convenient acts.

Apart from constructive criminal responsibility which may be imposed by statute, a court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind.

Pollock K. C. and *Lee* for Appellant.

Sir Robert Finlay K. C. and *O'Hagan* for the Crown.

The Judgment of their Lordships was delivered by

Lord Shaw :—This is an Appeal from a conviction and sentence of the Supreme Court of Seychelles. It was pronounced on the 5th July 1911 by the Acting Chief Justice, who tried the case without a jury.

The appellant is a merchant in Mahe on one of the Seychelles islands. He was at the time of the proceedings a member of the Legislative Council of the Colony and Consul for the French Republic, and he held various important commercial agencies. He was managing director of the firm of Lanier and Company.

It is for obvious reasons undesirable to comment upon various peculiarities of the case, and it is expedient to confine even the statement of the circumstances to the barest narrative. Such a narrative is, however, necessary.

There was in the colony a family of two minor children named Lablache. At a family council duly held under the law of the colony (derived from the French Civil Code) Miss Lucy Lablache was appointed to the office of their guardian. On the 14th November 1908 she executed in favour of the appellant a Procuration or Power of Attorney, and on the 2nd April 1909, on the eve of her leaving with the children for Europe, she confirmed the Procuration by what is called a Deed of Maintenance. Under these deeds the Appellant had the amplest powers to act for the guardian in the ingathering and the investment, either with or without security, of the property of the minors.

Acting under these powers, certain funds were received and remittances of money were from time to time made by Messrs. Lanier and Company, the appellant's firm.

From beginning to end of these proceedings no suggestion has ever been made that either the minors personally, or Miss Lablache,

their guardian, ever complained of, or are now or ever were dissatisfied with the conduct of the Appellant or his firm. Miss Lablache's anxiety appears to have been solely that a high rate of interest should be obtained, and this was done.

A circumstance of importance is that these payments were made by the firm of Lanier and Company. This firm's interposition (presumably at the instance of the Appellant) appears to have been highly in the interest of the minors in past years. A regular account was opened, and from the year 1905 the minors' funds were received and advances made from time to time by the Company. The advances were sometimes far in excess of the receipts ; and indeed in the end of 1908, whereas the receipts had been Rs. 6,119, the advances had been no less than Rs. 9,435.

In November 1910 a sum of Rs. 35,313 became payable to the minors by M. D'Emmerez de Charmoy. This gentleman proposed at first to pay by an order in favour of the Appellant and drawn upon the Appellant's bankers, Messrs. Said and Company, but the transaction took the shape of crediting the amount to Messrs. Lanier and Company in their account with their bankers, which account was overdrawn. This was an undoubted irregularity. Their Lordships incline to think that it occurred simply because the firm had been acting in the minors' interest and had had direct account with them for many years. No concealment of any kind was practised. The minors' account with Messrs. Lanier and Company was duly credited and all the entries throughout are openly and regularly made. After this date the firm continued to make advances as before out of this money which was lying with it at interest. The receipts for the last three remittances are produced; they are dated in February, April and May 1911 and cover payments of 1,500 francs. So far as M D'Emmerez de Charmoy was concerned, he also saw no objection to his payment being thus dealt with. Instead of making it to Mr. Lanier and getting that gentleman's receipt, he was aware that the bankers had simply credited their customers Lanier and Company with the amount. He was undoubtedly also aware of the history of the family, of the standing of the firm, and of its previous relations with the minors. That there was anything criminal being done does not at that time seem to have entered into any person's mind.

On the 20th June 1911, however a family council was held, which was presided over officially by Mr. Alexander Williamson, the Acting Chief Justice. A " Mr. Finlay Gemmel, friend" asked that Mr. Lanier " must show what cash he has in hand belonging to

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"the minors." Thereupon the Appellant stated fully and with almost complete exactness how the matter stood. Mr. Gemmel suggested that the amount be invested or paid or that a guarantee be given by Mr. Lanier. This was perfectly reasonable, and an adjournment was made till the 27th June to enable one of these courses to be taken. Mr. Lanier acquiesced; and on the 27th June a guarantee for Rs. 34,000, with a mortgage over the properties, was offered by Mr. Lemarchand, and this offer was, of course, unanimously accepted. One would have thought that everything was now satisfactorily arranged and ended. The minor's interests were completely protected. Sharply as the Appellant had been pulled up, he had answered the call the council were satisfied: and the guarantee and mortgage were put upon record. It seems incredible, but it is the fact, that it was after all this had been done that criminal proceedings were instituted against the Appellant under the Seychelles Penal Code.

On the same day an Information was filed charging Mr. Lanier with having wilfully, fraudulently and feloniously embezzled the minor's money on the previous 31st of May. And on that day, viz., 27th June, a warrant was issued for Mr. Lanier's arrest. On the next day, namely, the 28th June, the Chief Justice informed the family council that he had communicated with the Crown Prosecutor. The proceedings thus started were pursued with alacrity and vigour. The Prosecutor considered it desirable that a member of the Bar should conduct the case, and the family council, again presided over by the Chief Justice, appointed two, and arranged about their fees.

On the 1st November the Prosecutor moved the Chief Justice to be allowed to make drastic amendments to the Information, including one which altered the *tempus delicti* to the 20th June 1911, These amendments were objected to; the objections were repelled; and the trial was fixed for four days afterwards, namely, the 5th July.

On the 5th July an application was made for a week's adjournment to enable Counsel to be employed for the defence, and a telegram from Tamatavi, stating that Counsel's passage was booked, was produced. The application was refused. The evidence led was substantially in accord with the narrative already given. The books were produced with all the entries in order. No further facts suggesting criminality were proved. In short, Counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any jury upon the evidence submitted would have con-

victed the Appellant of crime. The Chief Justice, however, convicted Mr. Lanier and sentenced him to be imprisoned for eighteen months with hard labour and to pay the costs of the prosecution.

Application for leave to appeal to the Supreme Court of Mauritius was refused, on the ground that the case was not appealable. This was correct. Had the sentence been for two years an Appeal would have lain. A request was made that the sentence be increased so as to make the case appealable. This was refused. An attempt was then made to bring the proceedings before the Supreme Court of Mauritius by *certiorari*, with a view to their being quashed. The learned Judges of that colony not obscurely intimated that the affidavits before them disclosed a grave question, but they were constrained to decide that they had no jurisdiction to entertain such an application.

Application for leave to appeal to His Majesty in Council was then made and was granted by this Board.

Many grounds for a reversal of the judgment appealed from have been made, and in the affidavits which form part of the present Record others also of a grave character are suggested. It appears to their Lordships, however, that the matter may be disposed of by a consideration of the facts above mentioned, of the judgment itself, and of the reasons stated therefor, the whole being viewed in the light of the Statute. The information, as amended, upon which the trial proceeded, was as follows:—" That on or about the 20th day "of June in the year of our Lord one thousand nine hundred and " eleven, at Seychelles, at a place called Victoria, one Louis " Edouard Lanier, Merchant, residing at Victoria, did wilfully, " fraudulently, and unlawfully embezzle to the prejudice of the " minors Lablache the owners thereof, the sum of thirty-four thou- " sand one hundred and ninety-one rupees and thirty-three cents, " which sum had been delivered to the said Louis Edouard " Lanier merely in pursuance of a deposit or trust whilst he was act- " ing in his capacity as agent or proxy of the said minors' dative " guardian, viz, Lucie Lablache, and as sub-guardian of the said " minors, with the condition that the same be returned or produced " against the form of the Statute in such case made and provided " and against the peace of our Lord the King his Crown and " Dignity."

The statutory ground of the information was not stated in its text. But on the 1st July, when the motion for amendment of its terms was made, the Crown Prosecutor announced that he proceeded

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upon Section 216 of the Seychelles Penal Code. That Section is as follows:—

"Whoever embezzles, squanders away, or destroys, or attempts to embezzle "squander away, or destroy to the prejudice of the owner, possessor, or holder "thereof any goods, money, valuable security, bill, acquittance, or other docu- "ment containing or creating an obligation or discharge which has been delivered "to such person merely in pursuance of any lease or hiring, deposit, agency "pledge, loan (*pret a usage*) or for any work with or without a promise of remu- "neration with the condition that the same be returned or produced or be used "or employed for a specific purpose, shall be punished with imprisonment and a "fine not exceeding three thousand rupees (Rs. 3,000)."

In the construction of this Section placed before the Board by the learned Counsel for the Appellant, an argument was presented that the Section refers alone to the failure to restore or replace goods, money, &c., *in forma specifica*, and that the Section was accordingly inapplicable to a position like that of the ordinary breach of agency or trust, in which money, in the sense of the actual notes, sovereigns, or the like, does not fall to be returned, but only its equivalent. And the argument proceeded substantially to exclude all such ordinary cases as embezzlement from the ambit of the Seychelles Code, as it was also maintained that that crime was not dealt with by any other or more nearly applicable Section.

Against this argument Sir Robert Finlay, on behalf of the Crown, protested, and in their Lordships' opinion, the protest was well founded. The Statute does not appear to be limited in the sense contended for.

Upon the other hand, no countenance can be given to the view that the language of the Statute can be used to rank within the category of crime, conduct, or actions which do not essentially partake of the nature of embezzlement in the sense in which that term is ordinarily and properly understood. Although the term "embezzle" is supplemented by the terms "squander away or destroy," the whole context and view of the section show that the latter expressions are amplifications or exemplifications of the operations which are of the nature of embezzlement, in the sense that the conduct which is libelled has been a wilful appropriation by the accused of the property of another, or, after possession of the same had been acquired, of the wilful squandering or destruction of it to his prejudice. The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as, while preserving the amplest civil

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responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility which of course may be imposed by statute, a court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind. It is sufficient with regard to the judgment before the Board of the Acting Chief Justice to remark that such distinctions and, in particular, the distinction between criminal liability and civil liability to account, hardly seem to have been present to his mind.

Two observations may be quoted which make this clear :—

"The act is wilful and fraudulent if he ought to foresee that a prejudice can "result. It is not sufficient for him to state that he did not wish to cause prejudice, nor can he defend himself by saying that he did not foresee the result. "He ought to have foreseen it. It was his duty not only to himself, but to those "for whom he acted to take such precautions and to have exercised such fore-"sight as would not have involved him in the possibility of causing prejudice."

In so far as this is a statement of law, it is a proposition of constructive crime, and does not appear to be warranted by any sound interpretation of the section.

The second passage applies the erroneous doctrine thus :—

"In this case the wilful and fraudulent intent resulted from the fact that "the accused so used the moneys entrusted to him that he rendered himself un-"able to produce them when the demand was formally and legally made by the "council."

It is sufficient to say that, in the opinion of their Lordships, even though the legal doctrine proceeded upon were sound, the facts proved do not warrant, but negative, the conclusion drawn. The alleged date of the crime is the 20th June. That is the very date on which the position was explained by the Appellant, and it was arranged that full security should be given, and it was given as stipulated. It would be straining the Act to apply it to anything done on that date, or indeed to the facts as a whole which were proved in this case.

Their Lordships are of opinion that the rules thus laid down by the Judge are in no respect safe guides in a matter of criminal responsibility. If they were, all persons taking charge even for a day, or at the earnest solicitation of friends, of funds for investment, could be held criminally liable for errors in investment, or even for sanguine forecasts about investments, although their motives had been generous, and their conduct undeniably honest. These proposi-

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tions are not made in order to mitigate the rigour of that civil responsibility which must attach to all the dealings with the property of others; but they are so elementary as grounds of distinction between the categories of liability in a civil as distinguished from a criminal suit, that their Lordships regret that they appear on this occasion to have been left out of judicial view.

This omission would in any case be serious, but in the present case the point is not merely formal, and the sentence pronounced against the Appellant formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere.

In criminal case this Board does not lightly interfere. To use the language of Lord Watson in the case of *Dillet*[1]:—

"Such Appeals are of rare occurrence, because the rule has been repeatedly "laid down and has been invariably followed that Her Majesty will not review or "interfere with the course of criminal proceedings unless it be shown that by a "disregard of the forms of legal process or by some violation of the principles of "natural justice, or otherwise, substantial and grave injustice has been done."

The Appeal will be allowed, but not on any matter of form. Having carefully examined all the evidence, their Lordships are of opinion that the facts did not, on any just or legal view of them, warrant a conviction. It is unnecessary to consider arguments as to the rushing of the procedure or the harshness of the sentence, for, in their Lordships' view, even although the proceedings are taken to have been unobjectionable in form, justice has gravely and injuriously miscarried.

Their Lordships will humbly advise His Majesty that the Appeal be allowed, that the judgment and sentence appealed from be quashed, and that the Appellant be declared not guilty of the offence charged. Looking to the exceptional nature of the case the Crown will pay to the Appellant the costs of the Appeal. There will also be restored to him the amount of the costs of prosecution paid under the judgment of the Court below.

Solicitors for the Appellants:—*Messrs. Loughborough, Gedge Nisbet* and *Drew*.

Solicitors for the Respondent:—*Messrs. Sutton, Ommanney* and *Rendall*.

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1. (1887) 12 A. C. 467.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller.

Nallaboltu Bodi Naidu *alias* Venkatappa *Plaintiff.* Petitioner.*

v.

Chengama Naidu and others *Counter-Petitioners.*

Civil Procedure Code, Order 18 r. 18—Rules of Practice—Sanction of the District Judge—Local investigation by District Munsiff—Sanction necessary for levy of expenses.

A Munsiff is not bound to obtain the sanction of the District Judge before he makes a local investigation. Order 18 r. 18 leaves the matter absolutely in his discretion.

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Sanction is however required under the rules for the levy of money for expenses.

Petition under S. 115 of the Code of Civil Procedure to revise an order made by the District Munsif of Tirupati in M. P. No. 283 of 1912 in Original Suit No. 291 of 1911 on the file of the said Courts.

In this case where the right to the flow of water through a particular channel was in dispute and where the existence of the channel itself was disputed by the defendant, the plaintiff applied to the District Munsiff of Tirupati under O. 18 R. 18 of the new Code of Civil Procedure to make a local inspection of the channel in dispute. The defendants did not join in the application but the plaintiff deposited in Court a sum of Rupees 20 for the expenses of the Court for the inspection.

Thereupon the Munsiff wrote for sanction to the District Judge of North Arcot but it was refused as both parties did not join in the application as required by the rule under S. 392 of the old Code of Civil Procedure contained at page 53 of the Civil Courts Guide. Accordingly the Munsiff refused to inspect the locality and ordered the refund of the sum deposited. It was against this order that the present Revision Petition was filed.

N. Chandrasekhara Aiyar for Petitioner.

C. K. Mahadeva Aiyar for. *C. Venkatasubbaramiah* for Counter-Petitioners.

The Court delivered the following

Judgment:—So far as the rule at page 53 of the Civil Courts Guide made under S. 392 of the old Code of Civil Procedure

*C. R. P. No. 900 of 1912 26th November 1913

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requires the sanction of the District Judge for an inspection, it is clearly opposed to O. 18 r. 18 of the present Code which makes inspection purely a matter of discretion of the Court. The rule seems to apply only to cases where both parties agree to the inspection and seems to make no provision for payment of expenses in other cases or either to prohibit the payment of expenses in other cases. But it is open to the District Munsif, if he so desires, to make the inspection without charges and the District Judge's sanction is not required for that purpose. It is perhaps not necessary that I should set aside his order refusing to inspect, because that order will not prevent him from acceding to another application if one is made. But it is necessary to point out that as the law now stands the District Judge's sanction to make an inspection is not required and the District Judge's refusal will not affect the District Munsiff's discretion to make an inspection should he be asked to do so and see fit to comply without charges. The order does not therefore prejudice the petitioner. I need not interfere with it. I make no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller, and Mr. Justice Abdur Rahim.

Punga Seethai Ammal — *Appellant* * *(Plaintiff).*

v.

Punga Nachiyar Ammal and 5 others — *Respondents* *(Defendants).*

Seethai Ammal v. Nachiyar Ammal

Hindu Law—Inheritance—Step-mother—Mitakshara Law—Bandhu or Gotraja Sapinda—Not entitled to inherit.

Under the Mitakshara Law a step-mother is not entitled to succeed to the property of her step-son either as Gotraja Sapinda, or as a relation. She is not in the line of heirs at all apart from usage. *Mari v. Chinnammal*[1] followed.

To admit any relations other than those coming within the known categories is inconsistent with the Mitakshara scheme of inheritance.

In this case the usage set up in favour of step mother's right of inheritance was found against.

Appeal from the decree of the Court of the Subordinate Judge of Kumbakonam, in O. S. No. 50 of 1909 and petition to admit in evidence a copy of the judgment of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 15 of 1903.

*A. No. 161 of 1910. 6th November 1912.

1. (1884) I.L.R. 8 M 107 (F.B)

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Hon'ble Mr. *T. V. Seshagiri Aiyar* and *T. V. Muthu Krishna Aiyar* for Appellant.

T. Rangachariar and *K. Parthasaradhi Iyengar* for Respondents.

The Hon'ble. Mr. T. V. Seshagiri Iyer.—The step-mother is an heir under Hindu Law. She can come in as (1) mother (2) as a female Gotraja Sapinda or at least (3) as a relative before the property can be said to have escheated to the crown. The authorities are all against her being in the place of mother. As Gotraja Sapinda she must be held entitled to inherit. In *Mari* v. *Chinnammal* [1] the majority were wrong in holding that she was not a Gotraja Sapinda. *Muthusami Iyer J.* holds that she is a Gotraja Sapinda. In *Balamma* v. *Pullayya*[2] the wives of cousins are again said by *Muthusami Iyer J.* to be Gotraja Sapindas. See the definition of Sapinda in Mitakshara [*Miller J.* The Full bench in *Mari* v. *Chinnammal* [1] do not say that she is not a Gotraja Sapinda but only that she is not entitled to inherit as such and in that view *Muthusami Iyer* J. also agrees]. Then the view of the Judges in *Mari* v *Chinnammal*[1] that a step mother though a Gotraja Sapinda cannot inherit is wrong. They seem to proceed on the ground that she is not mentioned as heirs. Several decisions of this Court have held that females not mentioned are heirs. See *Kutti Ammal* v. *Radhakrishna*[3], *Narasimma* v. *Mangammal*[4], *Nallanna* v. *Ponnal*[5] *Ramappa Udayan* v. *Arumugath Udayan*[6] [*T. Ranga Chariar*:—They are all bandhus, blood relations]. The Privy Council held that the heirs in the Mitakshara is only illustrative not exhaustive, *Gridhari Lal Roy* v. *Government of Bengal*[7]. That view has been followed by all the High Courts. The same rule should be applied to female Gotraja Sapindas. The paternal great grandmother is heir [*T. Rangachariar*. She is a Sapinda in the strict sense not by marriage merely. She does not take as wife of the great grandfather but from her direct relation like mother and that before great grandfather.] Moreover the view of the full bench in *Mari* v. *Chinnammal* [1] is only a dictum not necessary for that case as in any case the competing claimant the paternal uncle would exclude her. [*Rahim* J. They don't put it on the ground of preference. They decide on full consideration that she is not an heir

1. (1884) I.L.R. 8 M. 107
2. (1894) I.L.R 18 M. 168
3. (1875) 8 M.H.C.R. 88
4. (1889) I.L.R. 13 M. 10
5. (1890) I.L.R. 14 M. 149
6. (1893) I.L.R. 17 M. 182
7. (1868) 12 M. I A. 448

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at all.] Step mother will at least come in as relation under section 7 Chapter II of Mitakshara. All relations must come in before the property passes to strangers.—See. *Kutti Ammal* v. *Radhakrishna*[1] [*Rangachariar* the word translated as "*relation*" is really "*bandhu*"]. See the criticism of Mayne in para 537 in his work and the observation in *Lakshmanammal* v. *Thiruvangada*[2]. Text of Apastamba cited in Mitakshara in that connection also says 'nearest kindred in their absence, disciple etc. [*Rangachariar.* The word is nearest Sapinda (Pratyasannasapinda)].

Step-son is heir to her stridhan and she will be heir to her step-daughter's stridhan. See *Kamala Bai* v. *Bhagirathi Bhai*[3]. It cannot be said she is no relation and no heir. Then he argued on the question of custom prevailing in the community by which step mothers are entitled to succeed.

T. Rangachariar:—The most ancient law was that no woman was heir to a male's property. Later certain women have been allowed to inherit. The Allahabad and Calcutta Courts have constantly held that none but females specifically mentioned can be heir. See *Ganri Sahai* v. *Rukko*[4], *Jagat Narain* v. *Shee Das*[5], *Jullossen koer* v. *Ugger Roy*[6], *Nabhi* v. *Gauri Shanker*[7]. *Jagannath* v. *Kshen Deo*[8], *Ramanund* v. *Surjiani*[9], *Lalagoti Lal* v. *Mussamat Durani Koer*[10], the last two being cases of step mother). All the females introduced by the Madras High Court stand on the footing that they are female bandhus and blood relations. Bandhus can be males as well as females, the females coming in after the males, see *Lakshmanammal* v. *Thiruvengada*[2]. The widows of Gotraja Sapindas who have acquired Sapindaship in its extended sense (as is said in Vaidyanatha Dikshityam, solely as wives of their husbands, have been constantly held by the Allahabad, Calcutta and Madras High Courts to be no heirs at all. See Mayne para 527. *Mari* v. *Chinnammal*[11], *Balamma* v. *Pullayya*[12], decide that. See also *Jogdambakoer* v. *Secretary of State*[13], where the crown took to the exclusion of a brother's widow. The Bombay decisions are based on usage peculiar to that province. See *Lallubhoy Rupabhai* v. *Cassibai*[14] She is not a bandhu being a sagotra. The observations in *Lakshmanammal* v. *Thiruvengada*[2], are withdrawn in (*Mari* v.

1. (1875) 8 M. H. C. R. 88.
2. (1881) I L.R. 5 M. 241.
3. (1912) 23 M.L.J. 518.
4. (1880) I.L.R. 3 All. 45.
5. (1884) I.L.R. 5 All. 311
6. (1882) I.L.R. 9 Cal. 725.
7. (1905) I.L R. 28 All. 187.
8. (1905) I.L.R. 28 All. 307.
9. (1894) I.L.R. 16 All. 221.
10. (1864) Ben. L.R. Sup. vol.67.
11. (1884) I.L.R, 8 M. 107.
12. (1894) I.L.R. 18 M. 168.
13. (1889) I.L.R 16 C. 367.
14. (1880) L.R. 7 I.A. 110.

Chinnamml[1]). There are no new class of heirs such as relatives after bandhus. The rule as to inheritance of Stridhanam is wholly different. Step mother or step son takes as Sapinda of father or husband as the case may be. See *Kamalabhai* v. *Bhagirathi Rai*[2]

T. V. Muthukrishna Iyer replied. In *Sundarammal* v. *Rangaswami*[3], female relations other than bandhus are recognised as possible heirs. *T. Rangachariar* That is explained in *Venkatasubramanian* v. *Thayammal*[4]. They being cognates take only as female bandhus after male bandhus.

The Court delivered the following

Judgment:—*Miller J.*—The plaintiff and the 1st defendant are both widows of the father of the last male owner of the property in dispute and they are both step mothers of the last male owner and the question is whether the plaintiff has any right to share in the property in dispute which has been conveyed to the 1st defendant by certain persons who alleged themselves to be the sons of the grandfather of the last male owner. The question so far as it turns on Hindu Law is whether a step mother is entitled to succeed in any circumstance to the property of her step son; and it has divided itself practically into two parts in this Court; first, whether she should not be given a right to succeed as being in the class of Gotraja Sapindas and secondly whether, even if she has no right as a member of that class, she still is a Sapinda within the meaning of that term in the Mitakshara and should be allowed to succeed, before the crown at any rate, as a relation, though not as a Gotraja Sapinda. In his opening Mr. Seshagiri Aiyar suggested but he did not press the contention that the step mother should be allowed to succeed as being equivalent or next door to the mother. I think it is clear that contention cannot succeed in the face of the decisions of this and the other High Courts. The contention which he did press then was that as a Gotraja Sapinda she ought to be allowed to succeed. It seems to me that question has been decided against him by a Full Bench of this Court in *Mari* v. *Chinnammal*[1]. It is suggested that we should treat that case as merely deciding that the step mother is to be postponed to the paternal uncle; but it seems to me that there is nothing in that case either in the Judgment of the Chief Justice *Sir Charles Turner* or in the Judgment of Mr. *Justice Muthusami Aiyar* which suggests that they had in mind the necessity of deciding any question other than whether the step mother is in the line of

1. (1884) I.L.R. 8 M. 107
2. (1912) 23 M.L.J. 518
3. (1894) I.L.R. 18 M. 193
4. (1898) I.L.R. 21 M. 268

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heirs at all. Perhaps I am wrong in saying it is not suggested because the learned Chief Justice does suggest the question, whether if she is in the line of heirs she is not postponed to the paternal uncle. But the decision of the matter did not proceed upon any preference of a male Sapinda to a female Sapinda except in this sense that female Sapindas unless they are named in the text of the Mitakshara are excluded altogether. That, I think, is what *Mari* v. *Chinnammal*[1] clearly lays down. No doubt both the Chief Justice who spoke for the majority and Mr. Justice *Muthusami Aiyar* who agreed with him though perhaps on slightly different grounds, both those learned judges took it that the step mother was a Sapinda within the meaning of that term as defined in the Mitakshara, but they do not base their decision excluding her from inheritance on the ground that, though a Sapinda, she must be postponed to the paternal uncle; they distinctly exclude her all of them and not merely postpone her. That is clear from the judgment of both the learned judges. "The claim of the step-mother as a Gotraja Sapinda," (that is her right to succeed in that capacity) says the learned Chief Justice (p. 129) "has not been in my judgment established and " (for the reason) "the claim of the paternal uncle must be allowed" not that she might come in if the paternal uncle were not a preferential heir, but that her claim as Gotraja Sapinda had not heen established. And Mr. Justice *Muthusami Aiyar* says "Though I entertain no doubt that she is a Gotraja Sapinda in the Mitakshara sense of Sapinda relationship, I do not think that all female Sapindas are recognised to be heirs in this Presidency," and then he gives certain instances and he suggests that if usage were in favour of the step-mother's claim he could not say that the Mitakshara actually declared against its legality, but he is not inclined to depart on that ground from the course of decisions upon the point. The result seems to be that the case we are asked to decide here has been decided by a Full Bench of this Court and that decision is clearly binding on us, and I for one am quite content to follow it and am not disposed to question it now. I therefore take it that it has been decided, so far as this Court can decide it, that the step-mother is not to be allowed to inherit to her stepson as Gotraja Sapinda.

Then I come to the second point which Mr. Seshagiri Aiyer raised, that is, whether she should not be allowed to succeed as a relation. Now it is very difficult for me to find any place in the scheme of succession laid down by the Mitakshara for relations who are not either those specially named as Gotrajas or Bandhus. No

1. (1884) I.L.R. 8 M. 107

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doubt there is a passage in *Kuttiammal* v. *Radakrishna*[1] which has been relied upon and which is criticised in *Jagdamba Koer* v. *The Secretary of State for India in Council* [2] which might suggest that the learned Judges there considered that all relatives however remote whether they be Sapindas or Bandhus or not, have to be exhausted before the estate can pass to the crown. The passage might suggest that, but the decision in that case has been explained in this Court to be that a sister was there allowed to succeed as being a Bandhu and, as has been pointed out in *Lakshmanammal* v. *Tiruvengada* [3] it does not necessarily follow from this passage that the learned Judges who decided the case of *Kuttiammal* v. *Radakrishna* [1] intended to suggest that there were other classes of heirs who were not in any of the classes mentioned in the Mitakshara. There is undoubtedly a passage in *Girdhari Lal Roy* v. *The Government of Bengal* [4] which lends support to the contention of the appellant. Taking a passage in the Viramitrodaya as reading that "maternal uncles and the rest" must be comprehended under the terms Bandhus as otherwise they would be omitted and their sons would be entitled to inherit and after them they themselves, which would be objectionable, their Lordships say that if that be the correct reading, it would follow that even if the maternal uncle and others who are not mentioned in the text of the Mitakshara relied upon were excluded from the list of Bandhus that is to say as I understand it, are not Bandhus still according to the Viramitrodaya they would inherit after the Bandhus. But in that case it was not decided whether it should be taken to be the law that persons who cannot be classed as Bandhus but were still relations could succeed after them. Their Lordships say "it is unnecessary to consider whether the title of any remote relation who could not be brought within the category of Bandhus or other class of heirs specified by the Mitakshara would prevail against that of the Crown;" and they held in the case before them that the maternal uncle of the father was a Bandhu of the father called as such entitled to inherit as a Bandhu. Therefore though that observation as to the construction of the passage in the Viramitrodaya certainly does suggest that their Lordships were prepared if necessary to consider the question whether there might not be relatives who might succeed though they were not Bandhus, that case does not decide that there was any such class of persons to be really found. I think it is very difficult as I said at the outset to find a place for any such class. The step mother is certainly not a Bandhu; if she comes in at all she must

1. (1875) 8 M.H.C.R 86 at p. 93.
2. (1889) I L.R. 16 C. 367.
3. (1881) I.L.R 5 M. 241.
4. (1868) 12 M.I. App. 448 at p. 467.

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come in as *Gotraja Sapinda*. It is very difficult to suggest where she comes, whether after all the Sapindas or after the Samanodakas or after all the males Gotraja and Bandhus as one class or otherwise.

The only other authority which has been cited to us as suggesting that there may be relatives who are not Bandhus in *Sundarammal* v. *Rangasami Mudaliar*[1] in which there is an observation at page 199. That has been explained in a later case *Venkatasubramaniam Chetty* v. *Thayarammal* [2] where the learned Judges point out that the same Judges who speak in *Sundarammal* v. *Rangasami Mudaliar*[1] of the sister's daughter as not being a Bhinnagotra Sapinda have subsequently in another case reported in the same volume *Balamma* v. *Pullayya* [3] said that the sister is admitted on the ground that she may be considered a Bhinnagotra Sapinda so that that case as it has been explained in later decisions of this Court does not afford any authority for the proposition that there is a class of relatives who are not Bandhus or Gotraja Sapindas who can inherit. The case I have referred to *Girdhari Lal Roy* v. *The Government of Bengal*[4] and the cases in this Court which have admitted certain female classes to inherit as Bandhus do not go further than this, that the list of bandhus as given in the Mitakshara is not exhaustive and that others who can be brought within the class of Bhinnagotra Sapindas may be allowed to inherit as bandhus. That being the state of the authorities I certainly am not prepared to set up a different view that there may be another class of relations who are entitled to inherit. There is no suggestion of that to my mind in the text of the Mitakshara, laying down that in the absence of Bandhus certain strangers can inherit, a text supported by a citation from the work of Apastamba to the effect that in the absence of male issue the nearest kinsmen is entitled to succeed and if there are no kindred, strangers can inherit. It has been argued before us that there is something in that text which suggests that there may be persons who are kindred who are not either Bandhus or Sapindas or any of the special heirs described in the opening part of Chapter II S. 2 of the Mitakshara. But the text of Apastamba, we are told, relates to the nearest (Sapinda) and whether that is so or not whether the text distinctly refers to Sapindas or not, there is no reason that I can see why we should in order to arrive at a proper interpretation of the term tendered in the text of Apastamba go outside those classes of persons who are mentioned as heirs by the Mitakshara. No other text has been cited nor any other decision of this Court, I think which warrants

1. (1888) I.L.R. 12 M. 193
2. (1898) I.L.R 21 M. 263
3. (1894) I.L.R. 18 M. 168
4. (1868) 12 M.I.A. 448

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the bringing in of relatives who are not Bandhus. And there is no case that I know of in the other High Courts which warrants it. On the other hand in *Jogdomba Koer* v. *The Secretary of State for India in Council*[1] it has been held that the brother's widow who is also a Gotraja Sapinda is not entitled to succeed in preference to the crown. I hold then that so far as the Mitakshara Law goes and apart from usage the step mother is not in the line of heirs at all, and if it were necessary to decide the point I should say that the property goes to the crown in preference to her.

Then a question of resjudicata was raised on behalf of the respondent on the ground that in a former suit a person alleging himself to be a nearer relation of the last male holder than the vendors of the present first defendant preferred a claim to the possession of the property now in question. The present plaintiff was the 1st defendant in that suit and the present 1st defendant was the 2nd defendant therein, and the present plaintiff alleged that there were no dayadies of the last male holder entitled to succeed before her. The only finding in that judgment, as I understand that passage in the judgment, is that the plaintiff in that suit was not so near a relative of the last male holder as the vendors of the present 1st defendant. No doubt the Subordinate Judge in that case does say that that the present 1st defendant's vendors were the nearest legal heirs, but I do not think that by saying so he intended to decide anything which was really in anyway in question between the first two defendants. He does not discuss that in his judgment or decide it expressly and it was not necessary for him to decide that in order to dispose of that suit; consequently I am of opinion that there is no bar by that suit.

Then the lower court was asked shortly before disposing of the case, after the first hearing and after the issues were settled to frame two new issues, one as to estoppel and the other as to the custom of the caste. As to estoppel I do not think there is any real ground for such an issue and the Subordinate Judge was right in not allowing it to be raised.

As to custom no doubt what was asked for was an issue as to the custom of the Presidency. The petition runs moreover according to the custom prevailing in this Presidency, the step mother is also heir according to Hindu Law. Really that does not suggest that the plaintiff was referring to any special caste custom. But I am not clear that we ought on that ground to refuse to allow the

1. (1889) I.L.R. 16 C. 367.

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issue to be raised. It ought no doubt to have been presented in the pleadings or at the first hearing, but it was actually presented before the evidence was taken, before anything more had been done than to settle issues and set down the case for argument on the preliminary issue of law. In those circumstances I am disposed to allow the plaintiff to raise a special issue viz., "whether according to the usage of the caste to which she and the 1st defendant belong the step mother is entitled to inherit to her stepson." I would ask the Subordinate Judge to take the evidence that may be adduced upon that issue and return a finding to this court within a period of two months. If the finding is in the affirmative, that is, if by usage the step mother is entitled to succeed, the Subordinate Judge will also return a finding on the two following issues: (1) Are Rangasami Chetti and Vasudeva Chetti mentioned in paragraph 3 of the 1st defendant's written statement heirs of Ramasami Chetti the Plaintiff's stepson, and (2) If so is the plaintiff by virtue of the usage established entitled to succeed in preference to them.

Evidence may be taken on these issues also. 7 days will be allowed for objections after the return of the finding.

Abdur Rahim J:—I agree.

In compliance with the above order the Subordinate Judge submitted a finding in the negative on the 1st issue.

After the receipt of the above finding their Lordships *Mr Justice Miller* and *Mr. Justice Oldfield* delivered the following judgment on the 17th November, 1913.

We agree with the Subordinate Judge that the evidence adduced on behalf of the plaintiff does not establish her case on the issue.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Spencer.

Muthu Sastrigal ... *Appellant* * (*Plaintiff-Petitioner.*)

v

Visvanatha Pandhara Sannadhi, Adhina Kartha of Sri Vedaneswara Swami Koil at Vedaranyam. } *Respondent* (*Defendant*).

Promissory note—Varthamanam—Construction—Loan and promissory note, parts of the same transaction—Action not maintainable apart from note—Note inadmissible for want of proper stamp—Evidence Act, S. 91.

Where a loan and a promissory note are parts of the same transaction, action is not maintainable for the amount advanced apart from the promissory note and where the promissory note is inadmissible for want of proper stamp, the lender has no remedy.

Muthu Sastrigal *v.* Visvanatha Pandhara Sannadhi.

Defendant gave a varthamanam or letter to the plaintiff which ran in these terms —"Amount of cash borrowed of you by me is Rs. 350.I shall in two week's time returning the sum of Rupees Three Hundred and fifty with interest thereon at the rate of one Rupee per cent. per month get back this letter." Held. that it was a promissory note and not merely an offer to borrow or an acknowledgment of indebtedness and had to be stamped accordingly:

Appeal under S. 15 of the Letters Patent from the judgment of the Hon'ble Mr. Justice Miller in C. R. P. No. 171 of 1912 preferred to the High Court against the decree of the Court of the Subordinate Judge of Negapatam in Small Cause Suit No. 1239 of 1911.

S. Varadachariar for Appellant.

Jayaram Aiyar for *G. S. Ramachandra Aiyar* for Respondent.

S. Varadachariar:—The document relied on is not a promissory note In the first place, it calls itself only a Varthamanam. There was no intention of making a note.—Chalmers p. 293. Where two constructions are possible that construction ought to be adopted which validates the instrument. In determining whether a document is a note, it is not the effect of but, the words used in, the document that ought to be borne in mind. There must be an undertaking. Mere acknowledgement of liability will not do. *Chendrakanth Mukerjee* v. *Kartikcharan*[1] *Karuthappa Rawther* v. *Barra Moideen Sahib*[2] *Thirupathi Gounden* v. *Rama Reddy*[3].

* L. P. A. No. 66 of 1913. 7th November 1913.

1. (1870) 5 Beng. L. R. 103, 107.
2. (1911) I. L. R. 36 M. 370.
3. (1897) I. L. R. 21 M. 49.

Muthu Sastrigal v. Visvanatha Pandhara Sannadhi.

Nor will a proposal to take a loan do. *Queen Empress* v. *Somasundaram*[1] *Bharata Pisherodi* v. *Vasudevan Nambudri*[2]. Action is maintainable on the consideration of the note assuming the note is bad for want of stamp; *Pothi Reddi* v. *Velayudhasivan*[3], proceeds upon a misconception of *Sheik Akbar* v. *Sheikkhan*[4], *Somasundram* v. *Krishnamurti*[5], is distinguishable on the facts *Yarlagadda Veera Raghavayya* v. *Gorantla Ramayya*[6], does not exclude the maintainability of a suit for the consideration though loan is simultaneous with the note. The latest case in which the matter is considered is *Baijnath* v. *Saligram*[7], *Rama Sarup* v. *Jasothakoer*[8], See also *Krishnaji* v. *Rajmal*[9]. There is a failure of consideration where the note is unstamped. The duty to restore is a duty imposed by law and not an obligation under the contract S. 91 Evidence Act is thus not infringed by decreeing the claim on consideration.

Jayaram Aiyar referred to *Chinnappa Pillai* v. *Muthuraman Chettiar*[10], *Mallayya* v. *Ramayya*[11] where the case in *Pothi Reddy* v. *Velayudhaswami*[3] has been followed.

The Court delivered the following

Judgment:—*Sadasiva Aiyar J.* The plaintiff is the appellant in this Letters Patent Appeal. He sued on the strength of a letter which has been held to be inadmissible in evidence and his suit has been dismissed by all the Courts. I shall now briefly refer to the arguments advanced by his learned vakil and to some of the cases quoted during those arguments. In the cases in the foot note to *Queen Empress* v. *Somasundara Chetti*[1] and in *Bharata Pisherodi* v. *Vasudevan Nambudri*[2] relied on by him the documents themselves showed that they were not to be treated as vouchers or securities unless the persons to whom the letters were sent gave loans as requested in the letters. As said in *Bharata Pisherodi* v. *Vasudevan Nambudri*[2] "There is no unconditional undertaking *on the face of the document* to pay the money". In the present case the so called *Varthamanam* or letter says, "Amount of cash borrowed of you by me is Rs. 350. I shall in two week's time returning this sum of rupees three hundred and fifty with interest thereon at the rate of one rupee per cent. per month get back this letter". It is clearly an unconditional undertaking, *on the face of*

1. (1899) I L.R 23 M. 155 at pp. 156 & 157.
2. (1903) I. L. R. 27 M. 1.
3. (1886) I L.R. 0 M. 94,
4. (1881) I. L. R. 7 Cal. 112.
5. (1906) 17 M. L. J. 126.
6. (1905) I. L. R. 29 M. 111 s. c. 15 M L J. 484
7. (1912) 16 I. C 33
8. (1911) I. L. R. 34 All. 158.
9. (1899) I L R. 24 B 360.
10. (1911) 9 M. L. T. 281.
11. (1911) 21 M. L. J. 462.

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this document to repay borrowed money, and it is therefore a promissory note and not merely an offer to borrrw or an acknowledgment of indebtedness.

As regards the case in *Tirupati Goundan* v. *Rama Reddi* [1] the language of the document in question in that case was quite different and very vague. Even so, I wish (with the greatest respect to the Judges who decided it), to be permitted to reverse my opinion if a document similarly worded happens to come before me for interpretation.

I therefore agree with the lower Courts, that the *Varthamanam* sued on is a promissory note and is inadmissible in evidence as not duly stamped.

As regards the contentions that, apart from the promissory note there was an independent obligation implied from the receipt of the plaintiff's money by the defendant and that that obligation could be established by proof of that fact, I think we are bound by the decisions in *Pothi Reddi* v. *Velayuda Sivan*[2] and *Somasundaram* v. *Krishnamurthi*[3]. It is contended that *Pothi Reddi* v. *Velayuda Sivan*[2] is not good law, as the learned Judges misunderstood an observation of *Garth* C.J. in the case of *Sheik Akbar* v *Sheik Khan*[4] on which they relied in support of their position. I am not satisfied that the learned Judges did so misunderstand *Sheik Akbar* v. *Sheik Khan.* [4] Even if they misunderstood *Sheik Akbar* v. *Sheik Khan* [4], they give independent reasons as follows:—"It is a necessary condition of every written contract that the terms should be orally settled before they are reduced to writing and to hold, when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp in the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of S. 91 of the Evidence Act".

Whatever may be the views of English Courts or even of the other High Courts (See the cases collected in *Baijnath* v. *Saligram* [5] I feel bound by *Pothi Reddi* v. *Velayuda Sivan* [2] not only because it has never been dissented from, but because the reasons above given appeal to my mind (if I may say so with respect) as very cogent. The contract in the case of a loan and a simultaneous promissory note has been reduced to writing in the form of the note which contains the definite terms of the contract and

1. (1897) I. L. R 21 M. 49.
2. (1906) 17 M. L. J. 126.
3. (1886) I. L R. 10 M. 94.
4. (1881) I. L R. 7 C. 256.
5. (1912) 16 I. C. 33.

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we cannot in my opinion, resort to inconsistent or consistent implied contracts in such cases simply because the contract as entered in the promissory note cannot be admitted in evidence. Not only has *Pothi Reddi* v. *Velayuda Sivan*[1] not been dissented from, but it has, without disapproval, only been distinguished in *Ramachendra Row* v. *Venkatramana Aiyar*[2] and *Yarlagadla Raghavayya* v. *Gorantla Ramayya*[3] while it has been expressly followed in *Chinnappa Pillai* v. *Muthu Raman Chettiar*[4] and *Mallayya* v. *Ramayya*[5].

To import the doctrines laid down in English cases about vague obligations to repay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received concealing the real contract of loan which had been reduced to the form of a document is, it seems to me, merely trying to nullify S. 91 of the Indian Evidence Act.

I do not intend to say that, if there is a contractual or other definite completed obligation capable of proof prior in date to the invalid promissory note, the plaintiff cannot sue on that prior independent obligation. But to treat the money paid at the very time of the execution of the promissory note inadmissible in evidence as giving rise to an independent contractual or other obligation seems to me to be inadmissible.

I would therefore dismiss the appeal with costs.

Spencer J :—I read the plaintiff's unfiled Exhibit as containing a promise to pay. This promise, though not a promise to pay on demand or to order, is an unconditional promise. There are no signatures of attesting witnesses so as to convert the document into a bond.

The mere use of the word " *Varthamanam* " instead of promissory note will not deprive the document of its character of promissory note, if its terms shew that it is such.

The execution of the document and the payment of the money may be treated as practically simultaneous, as the document was not made over to the plaintiff until it was ascertained that he was prepared to make the advance. It is all part of the same transaction. It is argued that the Plaintiff may have a separate cause of action to fall back on the original liability of the debtor and to sue the defendant for money had and received.

1. (1886) I. L. R. 10 M. 94.
2. (1899) I. L. R. 23 M. 527.
3. (1905) I. L. R. 29 M. 111.
4. (1911) 9 M. L. T. 281
5. (1911) 21 M. L. J. 462.

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Spencer J.

This is the view taken in *Krishnaji* v. *Rajammal*[1] and more recently in *Baijnath* v. *Saligram*[2] where the matter received full discussion.

The trend of Madras decisions is however different. See *Pothi Reddi* v. *Velayuda Sivan*[3] the same principle having been followed in *Chinnappa Pillai* v. *Muthu Raman Chettiar*[4] and *Mallayya* v. *Ramayya*[5].

I am not prepared to dissent from the view taken repeatedly by this High Court by various learned judges. I therefore concur in dismissing the Letters Patent Appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer

Murugesa Mudali and others ... *Appellants** (*Defendant Nos. 2, 3 and 5*)

v.

Ramasami Chettiar *Respondent (Plaintiff.)*

Limitation Act S. 4—Benefit of—S. 31—Availability of, in suits coming under.

Murugesa Mudali v. Ramasami Chettiar.

The benefit of S. 4 of the Limitation Act can be invoked in computing the period prescribed by S. 31 of the Limitation Act.

Appeal from the order of the District Court of Salem in A. S. No. 22 of 1912 preferred against the decree of the Court of the District Munsif of Dharmapuri in O. S. No. 28 of 1911.

The question in the case was whether the provision of S. 4, of the L mitation act permitting the institution of a suit where the last day of the limitation falls on a holiday applies to suits coming within S. 31 of the Act.

L. S. Veeraraghava Iyer for *L. A. Govinda Raghava Aiyar* for Appellants.

Dr. S. Swaminadhan for Respondent.

The Court delivered the following

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*C. M. A No 85 of 1913 14th November 1913

1. (1899) I. L. R. 24 B, 360
2. (1912) 16 I. C. 33
3. (1886) I. L. R 10 M. 94
4. (1911) 9 M. L. T. 281
5. (1911) 21 M. L. J. 462

Murugesa Mudali v. Ramasami Chettiar.

Judgment:—Adopting the reasoning of the Judgments in *Hirasing* v. *Mussammet Amarti*[1], we hold that the suit was not barred by limitation. We are not prepared to follow the decision in *Shevdas Doulatram* v. *Narayen*[2], and we think that the benefit of S. 4 of the Limitation Act can be invoked in the case of a suit governed by the Limitation period, prescribed by S. 31 (prescribed whether as a matter of grace or otherwise) and not merely the periods prescribed in the A Schedule.

It is unnecessary to consider the other two questions raised by the appellant's learned Vakil—one of them was whether on general principles of Jurisprudence a suit whose limitation period expired on a Sunday could be filed on the next day and whether *Gelmin* v. *Monggre*[3], was correctly decided.

The other question is whether S. 10 of the General Clauses Act applied in favor of the plaintiff, a question answered in the affirmative by *Chamier* J. in *Hira Sing* v. *Mussammet Amarti*[1].

In the result, the appeal is dismissed with costs.

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1. (1912) I. L. R. 34 A. 375
2. (1911) I. L. R. 36 B. 268
3. (1913) 2 K. B. 549

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court at Calcutta.]

Present :—Lords Atkinson and Shaw, Sir John Edge, and Mr. Ameer Ali.

Raja Durga Prasad Singh ... *Appellant.*

v

Rajendra Narayan Bagchi and others ... *Respondents.*

Raja Durga Prasad Singh *v.* Rajendra Narayan Bagchi.

Lessor and Lessee—Variation of rent—Unregistered document—Consideration, necessity for acceptance of reduced rent—Being voluntary and temporary—Presumption of—Deed—Construction—Boundaries and area—Conflict between—Evidence to show that area within boundaries less—Negotiations—Admissibility of—Abatement of fixed rent—Burden of proof—Act of Court leading to reduction of area—Not ground for abatement—Partial tender of rent—effect of.

Where a lessor by a pattah had leased out land described as 400 Bighas and lying within certain boundaries, containing coal mines, at a rent of Rs. 2500, the lessee took possession without raising any objection as to the extent of land he was given possession of, and worked the mines underneath. Subsequently, on representations made to the lessor that the coal was not of good quality, the rent was reduced to Rs. 2000 by an unregistered document. This arrangement lasted for some years when the heirs of the lessor claimed the original amount of rent, but the lessee tendered it at the reduced rate claiming to do so on the footing of the arrangement and also on the ground that the land was less than 400 bighas and that he was, therefore, entitle to an abatement

Held.—That the agreement was inadmissible in evidence as it was unregistered and that it was also unenforceable being without consideration.

That the acceptance of reduced rent was consistent with the reduction being voluntary and temporary and did not preclude the lessor from claiming the full rent.

That the question as to what had been demised depended entirely upon the construction of the lease and that construction could not be varied by extraneous evidence as to the negotiations that led up to the contract or by evidence showing that within the boundaries specified in the lease, there were not 400 bighas of land.

That the burden lay on the defendants to make out a case for abatement of fixed rent and they had failed to discharge the same.

Held, accordingly, that the tenders of rent and of interest on arrears of rent being based upon a reduced rent were not good tenders, either as tenders of rent or of interest and were therefore ineffective.

Plaintiff had previously sued the Defendant for an injunction to restrain him from trespassing on Mouzah Jharia Khas under pretence of the lease but the Court inadvertently passed a decree restraining the Defendant from working coal outside the area in Mouzah Dobari as delineated in the Amin's map. Defendant failed to appeal against the said decree.

* 3rd November 1913.

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Held: The fact that the decree of the Sub-judge prevented the Defendant from working coal in the full area included in his demise was not a ground for abatement of rent. The proper course for the defendant was to have appealed against the decree and got the decree amended

Appeal from a Judgment and decree of the High Court, dated August 26, 1909 modifying a Judgment and decree of the Court of the Subordinate Judge of Manbhum dated April 27, 1907.

One Raja Jaimangal Singh, the predecessor in title of the appellant owned a village named Dobari consisting of some 755 bighas of land in the Purganah of Jheirah in the district of Manbhum. On December 3rd 1894 the aforesaid Raja granted by a pottah to the respondent a Mokurrari Mourasi lease (heritable lease with fixed rent) of 400 bighas of land in Dobari at the annual rent of Rs. 2800. The respondent accepted it by a Kabuliat dated December 3rd 1894 which was duly registered. The respondent took possession of the said land and worked the coal mines for four years, but in December of 1898 he complained that the rent was much too high for the quality of coal found in the mines. The lessor therefore reduced the rent from Rs. 7 per bigha to Rs. 5 per bigha and executed a document dated December 7th 1898 which was never registered. The rent was, however, accepted at the reduced rate and amounted to Rs. 2000. In 1902, the original lessor having died the appellant brought a suit against the respondent and his brothers to restrain them from working the mines beyond the 400 bighas leased to the respondent. The Subordinate Judge of Manbhum found that the encroachment extended over 1600 sq. ft. and granted an injunction against the respondents in respect thereof, which on appeal was confirmed by the High Court. During the course of proceedings it was found that the respondents were not in possession of 400 bighas of land and therefore they claimed an abatement of rent proportionate to the deficiency. The appellant refused to accept the amount tendered at the reduced rate and brought a suit on August 15th 1903, claiming rent at the rate fixed upon by the pottah and the Kabuliyat *i.e.*, Rs. 2800 and the cesses. The Subordinate Judge held that the document executed in December 7th 1889 although unregistered was admissible and that the respondents were entitled to payment as fixed by the said document only and were not liable for the cesses. On appeal to the High Court it was held that the aforesaid document was not good for want of registration and of consideration but that the respondents were entitled to claim abatement of rent in proportion to the deficiency of land and were liable for the cesses. Against these findings the appellants appealed

to His Majesty in Council. (The Judgment of the High Court is reported in I. L. R. 37 Calcutta at page 290).

DeGruyther K.C. (with him *Parikh*) on behalf of the appellant contended that parties acted upon the contract from 1894 to 1898 having taken possession of the land in question in 1894. In 1901 it was again pointed out to the lessees what they had in possession. They made no objection nor did they make any inquiries as to the area. [Lord Atkinson: the lessees stood upon title and held possession]; the mention of the number of bighas was a mere matter of description. The Kalbuliyat expressly provides that the rent should not be varied and therefore there could be no abatement of rent.

Reference was made to the Indian Contract Act Ss. 13 and 20, and the Specific Relief Act S. 15 and the Assam Land Revenue Code ch. 33.

Sir E. Richards K. C. (with him *Dube*) for the respondents contended that the lessee trusted the lessor to give him 400 bighas as settled by the contract. The rent was already reduced in 1898. The lease dealt with the underground and not with the surface. Hence there would be no question as to the area. The lessee was in actual possession of 275 bighas only and was entitled to abatement of rent as if he had been evicted. The lessor gave what he could and the lessee accepted it and could legally claim reduction of rent in proportion to the deficiency.

Reference was made to *Mortlock* v. *Bulter*[1], *Still* v. *Buckley*[2], *Mc Kenzie* v. *Heckth*[3], *Imambandi* v. *Kamleswari Prashad*[4], *Woodfall's Landlord and Tenant* (1912) p. 478, *William's Vendors and Purchasers* (1906) p. 636.

De Gruyther replied.

The judgment of their Lordships was delivered by

Sir John Edge :—This is an Appeal by Raja Durga Prasad Singh, the plaintiff, from a decree, dated the 26th August 1909, of the High Court at Calcutta, which varied a decree, dated the 27th April 1907, of the Subordinate Judge of Manbhum in a suit for arrears of rent, cesses, and interest, which was brought on the 15th August 1906, in the Court of the Subordinate Judge of Manbhum, upon a mokurari kabuliyat of the 3rd December 1894.

1. (1804) 10 Vesey 292. 2. (1810) 17 Vesey 394.
3. (1877) 7.Ch. D. 675.
4. (1894) L. R. 21, I. A 118 s. c. I. L. R. 21 C. 1005.

The kabuliyat was executed by Rajendra Narayan Bagchi, now dead, who, with others who derived title through him, was a defendant to the suit. The pottah, corresponding to the kabuliyat, was executed by Raja Jaimangal Singh, now dead, the original lessor, whose interest vested before suit in the Plaintiff. In the kabuliyat, Rajendra Narayan Bagchi acknowledged having received from Raja Jaimangal Singh a pottah corresponding to the kabuliyat, and stated that "On the agreement that the heirs and representatives of "both of us, yourself and myself, shall be bound by all the terms "and conditions of the pottah and this kabuliyat, I execute this "mokurari maurasi kabuliyat." The pottah has not been put in evidence in this suit, but it has not been suggested by either side that it differs in any material respect from the kabuliyat or that anything turns upon the construction of the pottah.

The material words of the kabuliyat so far as it affects the matters in issue in the suit are as follows :—

"I, having applied to get from you a settlement of the rights of cutting, raising, and selling, etc., the coal underneath the 400 bighas of land described in the schedule below, within mouzah Dobari, in pergunnah Jharia, recorded in towzi No. 8 of the district Manbhum Collectorate, and which is within the zamindari owned and possessed by you in ancestral right, and you having granted my application, I hereby execute to you mokurari permanent maurasi kabuliyat for 400 bighas of land as per boundaries below, within the said mouzah and which will be enclosed by me on putting up masonry pillars at my own cost and according to demarcation made by you for your taking from me Rs. 8,400 as salami, and fixing an annual mokurari rental of Rs. 2,800 for the rights in coal under the said 400 bighas of land ; and I agree that year after year and according to the instalments, I shall pay to you into your zamindari kacheri, every year in three instalments, the fixed rental and also the road and public works cesses and other taxes and cesses payable by me according to law, that may be imposed in future by Government, namely, in Sraban of each year, Rs. 900, in Aghran Rs. 900 and in Chaitra Rs. 1,000 out of the rental fixed ; and after taking dakhilas for the same according to the usage in vogue in your serishta, I shall thereupon enjoy and continue to enjoy from generation to generation all the rights in the coal under the 400 bighas by cutting, raising and selling the same, after making the said coal fit for the market, and vested with the power of gift, sale and all kinds of assignment of the same according to pleasure. The rental fixed shall never on any account be varied. If I fail to pay any instalment of the rent or cesses, then for the unpaid instalment money, I shall pay interest at the rate of rupee one per cent. per mensem from the date of the lapsed instalment till the date of payment. If I fail to pay six consecutive instalments of the rent or cesses, &c., then on the next date of instalment you will be entitled to bring the settled coal lands into your khas possession. According to this kabuliyat I become vested with the right and title to the coal under the settled land from to day. I shall have to pay nothing for the year 1301 B.S., as rent or cesses, &c. From the year 1302 B.S., I shall continue to pay the entire rent Rs. 2,800 by proper instalments. You are not liable to me for the return of the above amount of selami (premium) or for any other matter."

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The schedule which is referred to in the kabuliyat is as follows:—

SCHEDULE OF THE BOUNDARIES.

"On the south—boundary line of mouzah Fatehpur, as per thak.

"On the west—boundary line of mouzah Jharia Khas, as per thak.

"On the east—border of the 100 bighas of land settled with Gopal Krishna Roy and others and the Ohatkari jore.

"On the north—boundary line of mouzah Bherakata, as per thak, and the Ohatkari jore.

"Right in the coal underneath the 400 bighas of land, within these boundaries."

The Plaintiff in his plaint alleged that default had been made in the payment of instalments of the fixed rent and of the cesses, and claimed a decree for Rs. 23,868 in respect of principal and interest and further reliefs. So far as is now material, the Defendants to this suit by their written statement alleged that the coal underneath 400 bighas of land in mouzah Dobari had been demised by Raja Jaimangal Singh to the Defendant Rajendra Narayanan Bagchi; that they had not been given possession of the underground rights of the 400 bighas of land; that they were entitled to an abatement of the rent which had been fixed by the kabuliyat; and that they had made tenders of the rent which, according to them, was due, and consequently denied that the interest which was claimed by the Plaintiff was payable. Their tenders were based upon a reduced rent. It appears that the grounds upon which the Defendants alleged that the plaintiff was not entitled to the rent fixed by the kabuliyat, and was entitled only to a reduced rent, were that Raja Jaimangal Singh had, according to them, in 1898 reduced the fixed rent from Rs. 2,800 a year to Rs. 2,000 a year on the representation of Rajendra Narayan Bagchi that the coal which had been demised was of inferior quality and could not be sold as steam coal, and that under part of the land no coal was found; and that by an injunction which was decreed on the 15th December 1902, in a suit which had been brought by the present Plaintiff on the 26th April 1902 the right of the Defendants to work coal under the demise was restricted to an area of 274 bighas 4 cottahs. The Defendants further alleged in their written statement that they had paid the cesses direct into the Collectorate, and denied that the Plaintiff was entitled in law to get any cesses. The Defendants claimed to set off *pro tanto* certain costs and interest thereon which had been allowed to them as against the Plaintiff by the decrees in the suit of the 26th April 1902.

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The Subordinate Judge of Manbhum held in this suit that the rent fixed by the kabuliyat had been reduced by Raja Jaimangal Singh to Rs. 2,000 a year and that the Defendants were not entitled to any further reduction. He also held that the Defendants had tendered the amounts of the reduced rent, and consequently that the Plaintiff was not entitled to interest in respect of the amounts so tendered. The Subordinate Judge also found that the Defendants had paid the cesses direct to the collector, and were not liable to pay them to the Plaintiff. The Subordinate Judge properly decided that the Defendants were entitled to set off the costs, with interest, awarded in the suit of 26th April 1902. From the decree of the Subordinate Judge each side appealed to the High Court at Calcutta.

The High Court found that the document by which the Defendants sought to prove that Raja Jaimangal Singh had agreed to reduce the rent from Rs. 2,800 to Rs. 2,000 a year was, for want of registration, inadmissible in evidence to vary the terms of the kabuliyat, and that the alleged agreement for reduction of rent was without consideration and was not enforceable. On both points their Lordships agree with these findings of the High Court. There was no reliable and admissible evidence to prove that Raja Jaimangal Singh ever bound himself to accept a reduced rent. The fact that he did forsome years accept a reduced rent is consistent with the reduction having been a mere voluntary and temporary abatement.

The High Court having found on evidence not contained in the kabuliyat that the rent of Rs. 2,800 a year had been fixed by Raja Jaimangal Singh and Rajendra Narayan Bagchi on the assumption that within the boundaries specified in the schedule to the kabuliyat there were in fact 400 bighas, concluded that the description by boundaries of the subject of the demise might be disregarded, and that the demise was a demise of 400 bighas, whether 400 bighas were or were not contained within the specified boundaries, and finding on the evidence of an Amin, which their Lordships will later consider, that within the specified boundaries there were not 400 bighas,and that the Defendants were in possession of only 275 bighas 3 cottahs 10 chittaks, the High Court decided that the Defendants were entitled to a proportionate abatement of the fixed rent.

Although, in their Lordships' opinion, the question as to what had been demised in 1894 turned upon the true construction of the kabuliyat, and that construction could not be varied by extraneous evidence as to the negotiations which led up to the contract which was, in fact, made, or by evidence showing that within the boundaries

specified in the schedule to the kabuliyat there was not 400 bighas of land, their Lordships consider that it will be satisfactory to ascertain what evidence, if any, there is as to the actual bigha area of land within the boundaries specified in the schedule to the kabuliyat, and how it happened that the right of the Defendants to work coal was, at the time when the rent sued for accrued due, restricted, apparently, according to the High Court, to the coal under 275 bighas 3 cottahs 10 chittaks.

Before the lease by pottah and kabuliyat was made the land within the boundaries specified in the schedule to the kabuliyat had not been measured. There is no evidence to show that the land had, at any time, been measured by, or on behalf of, Raja Jaimangal Singh. The Defendant, Rajendra Narayan Bagchi, in his evidence in this suit, stated, "The 400 bighas were fixed by "guess. It was not fixed by any measurement. When I took "the settlement (the lease) it was settled that I would get "400 bighas of land. It was also settled that if the land was "found to be less the deficit would be made good. He admitted that some months before the 26th April 1902 he had the coalfield in his possession measured by an Amin, but he stated that he did not remember how much land had been ascertained by that measurement. He said, "I never tried to ascertain the area myself." No evidence has been brought to their Lordships' attention which suggests that Rajendra Narayan Bagchi or any of the other Defendants ever complained to Raja Jaimangal Singh that they had not been placed in possession of the area of coalfield which had been demised in 1894. Raja Jaimangal Singh, who accepted in 1898 and subsequently a reduced rent, did so on the representation of Rajendra Narayan Bagchi that the coal was of inferior quality and was not saleable as steam coal, and that under part of the lands no coal had been found, and not on any representation or complaint that there were not 400 bighas of land within the boundaries specified in the schedule to the kabuliyat.

On the 26th April 1902, the present Plaintiff brought a suit against Rajendra Narayan Bagchi and others, who are either Defendants to this suit or are represented in title by Defendants to this suit. In this plaint of 1902 Raja Durga Prasad Singh alleged that the Defendants had wrongfully entered upon and worked his coal in mouzah Jharia Khas, and claimed damages and a perpetual injunction restraining the Defendants from cutting and raising the coal in Jharia Khas. In that suit of 1902 a Civil Court Amin was deputed to make measurements and to make a report. He made a

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report which is dated the 29th September, 1902. It appears from that report that for the purpose of measuring and preparing a map he received but little useful or practical assistance from those who represented the Plaintiff, and that the Defendant pointed out to him the lands of which they alleged that they had been given possession under the demise of 1894. According to the Amin's report the lands so pointed out by the Defendants measured 346 bighas 4 cottahs 4 chittaks, but he reported that the boundaries of the lands which were pointed out to him by the Defendants did not agree with the boundaries as specified in the kabuliyat. In his report the Amin stated that of the 346 bighas 4 cottahs 4 chittaks, only 257 bighas 3 cottahs 4 chittaks were within mouzah Dobari. It is to be observed that the lands which the Defendants pointed out to the Amin included part of mouzah Jharia Khas, where the Defendants were alleged to have committed the trespass, and it is also to be noticed that the Plaintiff in the suit of 1902 had alleged in his plaint that he believed that the coal in Jharia Khas was of a better quality than the coal which had been demised to the Defendants, and found a ready sale in the market. The Amin prepared a map which was in evidence in the suit of 1902, and is in evidence in this suit. According to his report of 1902, it was not possible for him to lay down on the ground the northern, western, and southern boundaries of the Defendants' holding, as there was no field-book to show the bearing at the station points and the distances of the chain lines. The Amin was examined as a witness in this suit on the 27th March 1907, when he stated that he had made the map by relaying on it the lands of the Survey and the Thakbast map. It is to be observed that the boundaries according to the Survey map and the Thakbast map did not agree. In his evidence given in this suit the Amin stated that the area of the lands lying within the boundaries which were specified in the schedule to the kabuliyat were 275 bighas 3 cottahs 10 chittaks, and that in mouzah Dobari, according to the Thakbast, there are 783 bighas 15 cottahs and 2 chittaks of land. If the statements as to areas, which will later be referred to, contained in the Judgment of the Subordinate Judge in the suit of 1902 and in the Judgment of the High Court in Appeal in that suit, be correct, the Amin must have confounded the areas shown by the Revenue Survey map with the areas shown by the Thakbast map. No reliable conclusion as to areas can be drawn from the report or from the evidence of the Amin.

The Subordinate Judge in the suit of 1902, in his Judgment of the 15th December 1902, stated that "The Amin's report shows that

"out of the 400 bighas let out to the Defendants, they are in possession of 346 bighas 4 cottahs and 4 chittaks only. Measuring, according to the Survey map, 86 bighas and 8 cottahs of this fall within mouzah Jhariah Khas and Fatehpur, and 2 bighas 13 cottahs and 5 chittaks fall within mouzah Bharakata, and 257 bighas 13 cottahs and 4 chittaks only fall within mouzah Dobari. But measured according to the Thak map, the whole of the land in the Defendant's possession, excepting 1,600 square feet, falls within mouzah Dobari." In that suit the Subordinate Judge found that the Defendants had trespassed on the Plaintiff's coal to the extent of 1,600 square feet. On the 15th December 1902, the Subordinate Judge "decreed that an injunction be issued to the effect that the Defendants do not carry on operations outside mouzah Dobari, as delineated in the map by the Civil Court Amin, according to the Thakbast map, and that the remaining portion of the claim be dismissed." Except that an injunction was granted, the suit was dismissed with costs. Whether intentionally or carelessly it is difficult to say, but the injunction which the Subordinate Judge granted was wider in its operation than was the injunction which had been asked for in the plaint of that suit. The Subordinate Judge should have confined himself to the question which he had to determine, which was whether the Defendants had committed a trespass by working coal in the Plaintiff's mouzah Jharia Khas, and having found that the trespass had been committed, he should have confined the injunction to be granted to the injunction which the Plaintiff had asked for, namely, an injunction restraining the Defendants from trespassing in mouzah Jharia Khas. The Subordinate Judge was not concerned with the extent of the area demised in 1894 in mouzah Dobari. The result is that the Defendants are restrained from working coal outside the limits of mouzah Dobari, as delineated correctly or incorrectly, by the Amin in his map, which he stated that he had prepared according to the Thakbast map.

From the decree of the 15th December 1902 of the Subordinate Judge the Plaintiff appealed to the High Court at Calcutta. The Defendants submitted themselves to the injunction which had been granted, and did not appeal. The learned Judges of the High Court who heard the Appeal stated in their Judgment that "The area demised to the defendants was 400 bighas within Dobari but they actually hold only 346 bighas. This actual area belongs to Dobari, if the boundaries of that village be taken according to Thakbast map, but only 257 bighas of it belong to that village according to

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"the Revenue Survey map. It is possible that 346 bighas were "leased to the Defendants as 400 bighas, but it seems impossible "that only 257 bighas could have been leased to them as 400." The High Court dismissed the Appeal with costs. But whatever may be the area in bighas within mouza Dobari of the land which the Defendants pointed out to the Amin as being in their possession, it is obvious to their Lordships that the Subordinate Judge and the High Court considered that the Defendants had 346 bighas of land within mouzah Dobari underneath which they might lawfully continue to work the coal under their kabuliyat, and that the Subordinate Judge had not intended that the injunction which he was granting should have the effect of reducing to 257 bighas the area in mouzah Dobari within which the Defendants might lawfully work the coal under the kabuliyat. Their Lordships have no means of ascertaining what was in bigha measurement the area in mouzah Dobari to which the Defendants were restricted by the injunction of the 15th December 1902, and whatever that area may in fact be, it must be borne in mind that there is no evidence to prove that the lands which the Defendants pointed out to the Amin were the lands of which they had, in fact, obtained possession in 1894.

It was for the Defendants to make out a case, if they had one, for an abatement of the fixed rent. On this part of the case their Lordships find that the Defendants have not proved how many bighas in fact were contained in the area of mouzah Dobari which is within the boundaries which are specified in the schedule to the kabuliyat, and they have not proved the area in bighas within those boundaries of which they were put in possession. They have not proved that the area which they pointed out to the Amin as the area of which they were in possession was the area of which they obtained possession under the kabuliyat. They have not proved that otherwise than by the action of the Court of the Subordinate Judge in the suit of 1902, in granting the injunction in the form in which it was granted, and by their own neglect to appeal from that decree, they have been deprived of the right to work any coal which otherwise they would have been entitled to work under the demise. The action of the Subordinate Judge in granting the injunction in the form in which it was granted gave the Defendants no right which they could enforce by suit or of which they could avail themselves as a defence to a suit for the fixed rent, although the injunction probably restricted their right to work the coal which had been demised in 1894; they had their remedy by way of Appeal from the decree which granted the injunction, but they did not avail them

selves of it. In their Lordships' opinion the Defendants have failed to prove any facts which would entitle them to any abatement of the rent fixed by the kabuliyat.

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It follows from what their Lordships have said that the tenders in respect of rent, and interest upon arrears of rent, which the Defendants relied upon, having been tenders based on a reduced rent, were not good tenders, either as tenders of rent, or of interest on arrears of rent, and were ineffective.

The High Court in the Appeal in this suit found that the Defendants had not proved that they had paid to the Collector the cesses and taxes which under the kabuliyat they were bound to pay to the Plaintiff, and gave the Plaintiff a decree for Rs. 361.3.0 in respect of cesses, calculated on a reduced rent; the Plaintiff is entitled to recover the sum of Rs. 525 in respect of cesses, the only defence pleaded as to the claim in respect of cesses having failed.

Their Lordships will humbly advise His Majesty that this Appeal should be allowed, and that the decree of the High Court should be varied by decreeing the Appellant's claim for Rs. 23,868-0-0 less Rs. 3083-7-9 costs, due by the Appellant to the Respondents in respect of the previous suit of the 26th April 1902, with interest at the rate of Rs. 6 per centum per annum from the date of suit until realisation on the balance decreed, namely on Rs. 20,784-8-3, with costs in the Court of the Subordinate Judge, and on Appeal in the High Court.

The Respondents must pay the costs of this Appeal.

Solicitor for appellant:—*E. Dalgado.*

Solicitors for respondents:—*W. W Box & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Gouse Moideen Saib — *Appellant** (*1st Deft.*)

v

Muthialu Chettiar and another — *Respondents.* (*Plaintiff and 2nd Deft.*)

Gouse Moideen Saib v. Muthialu Chettiar.

Estates Land Act Ss. 131—Fraud—Right of suit to set aside sale, on the ground of—Jurisdiction—Civil Courts.

The right conferred by S. 131, Estates Land Act to set aside a sale by application to the Collector does not take away the right of suit in the ordinary Civil courts to set aside the sale on the ground of fraud.

S. 189 of the Act only takes away the right to apply to the Civil Court to enforce the right conferred by S. 131.

Civil Miscellaneous Appeal from the order of the District Court of Madura in A.S. No. 117 of 1912 preferred against the decree of the Court of the District Munsif of Melur at Madura in O.S. No. 135 of 1912.

C. S. Venkatachariar for Appellant.

K. S. Jayarama Aiyar for Respondents.

The court delivered the following

Judgment:—The plaintiff's right to pursue the remedy granted by S. 131 of the Estates Land Act through an application to the Collector cannot take away his right of suit in the ordinary civil Court to set aside the sale on the ground of fraud, especially as the remedy by application to the Collector is accompanied by the imposition of an onerous condition to pay 5 per cent. of the purchase money as a *solatium* to the purchaser besides the purchase money and to make the application within a more limited period than is allowed for a suit in the ordinary courts. (See S. 9 C.P.C. S. 213 cl. (4) of the Estates Land Act and the *Zemindar* of *Ettiapuram* v. *Sankarappa Reddiar*[1].) The argument of the appellant's (first defendant's) learned Vakil that S. 189 of the Estates Land Act takes away the right to bring a suit in the Civil Court to set aside a sale on the ground of fraud cannot be accepted. It only takes away the right to apply to the Civil Court under S. 131 of the Estates Land Act to set aside the sale in accordance with the provisions of that Section.

The order of the learned District Judge reversing the Judgment of the learned Munsif (who dismissed the suit as not entertainable in a Civil Court) and remanding the suit to the Munsif for proper disposal was correct, and we dismiss with costs the appeal preferred against the said order of the District Judge.

* C.M.A. No. 87 of 1913. — 13th November 1913.

1. (1903) I.L.R. 27 M. 483.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller.

Ottapurakkal Thayath Suppi and others *Petitioners**

v

Sayid Alabi Masaber Koya *alias* Koya Kunhi Koya. *Respondent.*

Thayath Suppi v. Masaber Koya.

Civil Procedure Code, Order 43 r. 1 (r)—Order 39 r 2—Order refusing commitment—Appeal against—Maintainability of—Attachment and commitment—Powers of—May be alternatively exercised.

An order refusing to attach the property of a person who has disobeyed an injunction or to commit him to prison is an order under Or.39 r. 2 and an appeal lies against such order under Order 43 r. 1 (r).

The powers of attachment and commitment conferred by Order 39 r. 2 can be exercised alternatively and the Court is not bound to attach the property before ordering commitment.

Quaere, if the powers can be exercised cumulatively.

Petition under SS. 115 and 151 of Act V. of 1908 praying the High Court to revise the order of the District Court of North Malabar in C.M.A. No. 10 of 1912, C.M.P. No. 821 of 1911 in O. S. No. 952 of 1909 on the file of the Court of the District Munsif of Badagara.

J. L. Rosario and *Hon. T. V. Seshagiri Iyer* for Petitioners.

A. Sundaram and *A. Rangasami* for Respondent.

The Court delivered the following

Judgment:—I have no doubt that in this case an appeal lay to the District Judge. The decision in *Venkatasami* v *Stridavamma*[1] is an authority which is binding upon me. It was decided under the old Code in a case in which the Court below had refused to appoint a receiver under S. 503. O. 43 R. 1 (r) of the present Code provides that an appeal lies from orders "under" O. 39 R. 2 and if I follow the Full Bench case I must hold that an order refusing or declining to attach the property of a person who has disobeyed an injunction or to commit him to prison is an order 'under' that rule. I am bound to follow that case, and I must hold that an appeal lay.

Apart from that case, the language of O. 43 suggests the same conclusion. Some of the sub-rules provide for appeals from orders refusing to make the order which is expressly provided for in the rules referred to in those sub-rules and such orders are described

* C. R. P. No. 772 of 1912. 13th October 1913.

1. (1886) I. L. R. 10 M. 179.

Thayath Suppi v. Masaber Koya

order such person to be detained" in Order 39 rule 2 sub-rule 3; and it is contended that that means that in addition to the attachment the Court may order such person to be detained in the Civil prison and inasmuch as there is no attachment in this case, the order for detention is illegal and is an order which I must correct under S. 115. I have had some doubt but on the whole I think it is not so. Though the language of the present Code is changed the change has not, I think, effected a change of the law at any rate so as to make it first to order attachment before ordering commitment. The phrase 'may also commit' means, I think, 'shall also have the power to commit'; that is to say the rule gives two powers, power to attach and also power to commit. It does not expressly say that both may be exercised cumulatively and I need not decide whether that is the law or not. The rule does I think necessarily imply that the powers may be exercised alternatively and that was allowed by the old code.

That being my view of the case, there is nothing wrong in the order of the District Judge and I dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair, and Mr. Justice Tyabji.

Mahaboob Sarafarajawant Sri Raja Parthasarathy Appa Rao Bahadur *Zamindar* Garu. } *Appellant.** (*Plaintiff.*)

v.

The Secretary of State for India in Council represented by the Collector of Kistna, and others. } (*Respondents Defendants.*)

Madras Regulation XXV of 1802—Pre-settlement Inams—Lands held on Service tenure—Personal service to Zamindar—Service quasi public before settlement—Ceased to be such after—Presumption—Right to Resumption by Government—Burden of Proof as to exclusion at the time of settlement—Evidence Act, Ss. 106 and 114.

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Where lands in a Zamindary were granted before the time of the permanent settlement in inam on condition of rendering personal service to the Zamindar such as attending on him, following him with arms and guarding his treasury in addition to a favourable quit rent and the Government sought to resume the inams on the ground that they were presettlement inams

Held that the services being private and personal to the Zamindar *prima facie* the inams would form a part of the assets of the Zamindari and the Zamindar was the person entitled to resume.

The burden of proving that such lands were excluded from the assets of the Zamindari and that the right to resume belonged to Government lay on the Government.

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Duties such as guarding the treasury which were quasi-public before the Settlement ceased to be such after the settlement and therefore, the same considerations that apply to Inams held on condition of personal service to the Zamindar apply also to Inams granted for the performance of those duties.

Held also that where services are rendered in addition to quit rent the lands do not come within the proviso to S. 4—Reg. XXV of 1802.

Per Tyabji J.—The Government having special means of knowledge as to exclusion or otherwise of the inams at the settlement from the assets the burden was upon them under S. 106 of the Evidence Act.

The Government not having produced the accounts in their possession the presumption that if produced the accounts would be unfavourable to them should be drawn against them.

Second Appeal from decree of the District Court of Kistna at Masulipatam in Appeal Suit No. 503 of 1911, preferred against the decree of the Court of the District Munsif of Bezwada in Original Suit No. 512 of 1909.

Ramesam for *S. Srinivasa Iyengar* for Appellant.

The Government Pleader (C. F. Napier) for the Respondent.

The Court delivered the following

Judgment :—*Sankaran Nair J.* :—The question for decision is whether the reversionary right in inams granted prior to the permanent settlement for services to be rendered by the inamdars to the Zamindar, in addition to the payment of quit-rent is vested in the Government or in the *Zamindar*. The suit is brought by the plaintiff, a Zamindar holding a permanent sanad. His case is that the lands in suit were granted in inam to the ancestors of the present holders on condition of rendering personal service to the *Zamindar*, such as following him with arms in the journeys, watching his treasury etc. He alleges the inam forms part of the *Zamindari* estate and the Government has no right to the same. According to him, the full rental value of the inams and not merely the rent which was paid thereon was included in the *Zamindari* at the time of the permanent settlement and his contention is that no additional assessment can be imposed by the Government. The Government have resumed these inams in 1907 and granted pattas to the persons in possession of the lands. He contends that such resumption is illegal. The contention of the Secretary of State for India is that the inams were pre-settlement inams and that the reversionary right in them therefore vests in the Government and, as the inamdar has ceased to render any services to the *Zamindar*, they were rightly resumed by the Government who assessed them and assigned them to the present holders thereof on ryotwari patta.

There is no denial in the written statement that the lands were granted on inam for rendering services to the *Zamindar* as alleged by

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the plaintiff. The Munsif passed a decree in favour of the plaintiff. That decree has been reversed by the District Judge, and this is an appeal from his decision.

It appears from the inam record Exhibit III that the services rendered by the inamdars consisted of guarding the revenue collected in the village by the Zamindar, accompanying the remittances to the Zamindar's residence and attending on him at his residence; and, it appears that for these two latter they also received some batta. It is said in the written statement filed by Government that "as the inamdars ceased to render any service, they (the inams) were rightly resumed by Government" Now it is not explained how the failure to render the services above enumerated, and it is not alleged that there were other services to be rendered, gave the Government a right to resume the inams. Neither the Government nor any portion of the community were interested in those services. They do not suffer in any way by their non-performance. The person injured is the plaintiff, and he is entitled to take steps to have the services performed by the inamdars or to get them performed by others and get damages from them. If the inams are resumable, *prima facie* therefore he is the person entitled to resume them; the written statement discloses no valid answer to this objection. However the lower Appellate Court has not considered this question. What was argued before the District Judge apparently was whether these were lands excluded from the permanent settlement under S. 4 of Regulation XXV of 1802. In second appeal it is contended on behalf of the appellant that the question is concluded by authority. In Second appeal No. 73 of 1908, (*Rajah Venkatarangayya* v. *Appalarazu*[1].) the case relied on, the facts were these ; the lands in question were given by the Zamindar for minstrel service in 1718. On the death of one of the service holders the Zamindar resumed these lands. In 1900 the Government imposed an assessment alleging that they were *lakhiraj* lands in 1802 at the time of the permanent settlement and therefore that he had no title thereto. The learned Judges, *Miller* and *Munro* JJ., held that on the evidence the inam was granted by the Zamindar before the permanent settlement for private services rendered to him and on condition that they should be held so long as the services were continued to be rendered. They were of opinion that no presumption arose under these circumstances that the land was *lakhiraj* or exempt from payment of public revenue and therefore excluded from the permanent settlement with the Zamindar. They

1. (1910) 20 M. L. J. 728.

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referred to the observations of the Chief Justice in *Rajah Nilmonye Singh* v. *The Government*, [1], that, "the Goverment would not have allowed any portion of their revenue in consideration of private services to be rendered to the Zamindar." This observation was quoted without disapproval by the Privy Council in *Rajah Nilmonye Singh* v. *Bakranath Singh*, [2], and they pointed out that holding lands free of money rent to the Zamındar did not make them exempt from the payment of 'public revenue' as used in section 4 of Regulation XXV of 1802. According to these cases, therefore, when lands were held on condition that the holders were to render certain services which were purely personal to the Zamindar and in which the Government were not interested, *i. e.*, when such services had nothing to do with police or magisterial duties, or did not concern the community or the villagers, then the Government were entitled to include in the Zamindary assets for settling the peishkush the income from the lands allowed in lieu of such services which were not allowed for in the settlement ; there is therefore no presumption they did not do so or treated the land as free from payment. In the case before us the judge states that this cannot be regarded as personal service to the Zamindar in consideration of which the Government would not allow any portion of their revenue. It may be that prior to the permanent settlement these were *quasi* public duties, as it was the Zamindars who collected the revenue for the Government but from the time of the settlement they ceased to be such and it was not necessary for the Government that those services should any longer continue to be done by the Zamindars, because in the performance of those services the Government or any section of the community were not interested and there is no reason for the Government continuing any allowances for these duties.

The District Judge also holds that the decision in *Rajah Venkatarangayya* v. *Appalarazu*, [3] does not apply to the case, presumably for the reason that in addition to rendering the services the holders of land had also to pay a rent of Rs. 6 per putti. The point for consideration in such cases is whether the Government only included the income actually received by the Zamindar from these lands in the estate of the Zamindar when they fixed the peishkush. If they included the whole income, then the Government are admittedly not entitled to enfranchise the land. If they included only Rs. 6 which was the rent then actually paid by the inamdar, then the Government would be entitled to do so. The question is purely one of fact. As pointed out by the Chief Justice in the

1. (1866) 6 W. R. 12.
2. (1882) 9 I. A. 104 at p. 121.
3. (1910) 20 M. L. J. 728.

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passage above extracted, the Government would not have allowed any portion of their revenue for services to be rendered to the *Zamindar*, and, as a rule, the reports of the various officers when the permanent sanads were granted show that this rule was followed, and, whenever any reductions were made by the *Zamindar* from the total income derivable from the Zamindari for payment to peons and other persons who were rendering services to the *Zamindar*, in the continuance of which the public were not interested, they were disallowed. The reports on which the peishkush in question was fixed are with the Government and they do not produce them. About 1860 an Inam Commissioner was appointed to enfranchise the inams in which the Government have a reversionary right, and the fact that in the course of that enquiry the Government decided not to enfranchise these inams in question on the ground that they were not entitled to a reversion is strong evidence against them. The Judge states :—"It seems to me evident that at the time of settlement, Government would have exempted all lands that were paying only a favourable rent when arriving at total income of the *Zamindari*; for, if they did not, it would amount to this, that if they were taking a two-thirds share in the income, of the *Zamindari* on all such lands, if they included them in the income, they would only get ⅓ of the nominal rent, whereas the Zamindar would get his one-third of the nominal rent and all of the service to pay for which the rent had been reduced.

"For example in these cases if the real rent was Rs. 18 a putti and it was reduced to Rs. 6 quit-rent, Government would get only Rs. 4 as its share instead of Rs. 12 whilst the Zamindar would get the full service just as before or, in other words, Government would be paying two-thirds of the servants' wages and he only one-third though Government would be getting no benefit from the service." This begs the question in issue which is whether the Government took Rs. 18 or only Rs. 6 for settlement purposes. The presumption is they took Rs. 18. The usage of more than a century is in support of that view. Even otherwise the practice of a century is not to be set aside by a theory as to the Government procedure in 1802.

The Judge also gives another reason. I will give it in his own words:—"It has been argued that the word ' only ' coming before 'favourable quit-rent' means that the lands must pay quit-rent and nothing else and as in these cases there was service rendered as well, they would not fall within the exempted lands. This is too much hair splitting to appeal to me and I need merely remark that all grants

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of inams on favourable quit-rent implies some service to be rendered. Also if we are to go into the very words I do not think that in 1802 when English was at its best that even a draftsman of a legal enactment would have thought of including rendering 'of services' under the word 'paying.' "

The answer to this is contained in the words of the section referring to the lands. The words run thus: "Of all other lands paying only favourable quit-rents." In my opinion this obviously does not include lands which are held on condition of paying a certain rent and of rendering certain services in addition to that rent. In such a case the land is not held on a favourable quit-rent.

For these reasons I reverse the decree of the Court below and restore that of the District Munsif with costs payable by the 1st defendant in this and in the lower appellate Court.

Tyabji J:—The question involved in this appeal is whether the Government is entitled to resume the lands referred to in the plaint, on the ground which is thus stated in the written statement of the Secretary of State (the 1st defendant):—

'The inams being pre-settlement grants, the reversionary right in them vests in Government and as the inamdars ceased to render any service, they were rightly resumed by Government, assessed and assigned to the present enjoyers on ryotwari patta.'

If the lands were included as part of the plaintiff's *Zamindari* in the permanent assessment made in accordance with Regulation XXV of 1802, then it is admitted that the Government has no right to resume the lands.

The Government contend that the lands were not so included, having been excluded under section 4 of the said Regulation. The part of section 4 at present material is as follows:—

4. "The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads of...... ....all other lands paying only favourable quit-rents—the permanent assessment of the land-tax shall be made exclusively of the said articles now recited."

It is admitted that "the suit lands were inams granted by the ancestors of the plaintiff" (see the District Judge's Judgment paragraph (2). It would therefore seem to be for the Government to establish that prior to the permanent settlement the lands had been so

severed from the plaintiff's *Zamindari* as no more to form part of it. That fact can be established by the production of the records of the permanent settlement, which would show almost conclusively whether the lands had been assessed as part of the *Zamindari*, or had been excluded as " lands paying only favourable quit-rents" (under section 4). These records have not been adduced in evidence by the Government. It was at one stage of the argument suggested on behalf of the Government that there might have been some difficulty in the production of these records ; but that suggestion had to be abandoned, especially in view of the fact referred to by my learned brother in the course of the arguments that a considerable portion of the records has been printed as part of the records in another appeal. Under these circumstances, it seems difficult for the respondent to withstand the applicability of section 106 of the Evidence Act which lays down that "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him," and illustration (g) to section 114 to the effect that "The Court may presume, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

Notwithstanding these circumstances, the District Judge has held " that the suit lands fall within the exempted lands mentioned in section 4 of Regulation XXV of 1802." He came to that conclusion in a carefully written judgment, but it seems to me that he erred in drawing the legal conclusions from the facts which were before him ; and that consequently the error was of such a nature that we ought to interfere in second appeal.

In holding that the lands in question fall within the description of 'lands paying only favourable quit-rents' in section 4, the learned District Judge states that he " can find nothing to distinguish between quit-rent to Government and quit-rent to the *Zamindar* in section 4." But the answer to the question to whom such rent is payable seems to me to have an important bearing on the question whether or not the lands form part of the *Zamindari*. When the quit-rent is favourable, there must be some circumstances such as the rendering of services, or dedication to a charitable or religious object which is favoured by the Government, and the existence of which circumstance forms so to say the complement of the favourable rent: and the two together (viz., the favourable rent and the rendering of service or other circumstance of a similar nature) make up that total consideration which in ordinary cases is represented solely by rent. In cases therefore where the land is held in consideration

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partly of a favourable quit-rent and partly of services rendered by the holder of the land, if it is not clear whether the services are to be rendered for the benefit of the Government or of the Zamindar, it seems not unreasonable to look to the destination of the rent for discovering where the services are due. There may be cases where one of the two portions, into which the consideration proceeding from the holder of the land is so split up, becomes due to the Government and the other to the Zamindar. But such cases would in the natural course of events be rare. In my view of the case, therefore, the learned District Judge erred in overlooking the significance of the fact that the rent was payable not to the Government but to the Zamindar.

The learned District Judge next expresses the opinion that all lands paying a favourable quit-rent to the Zamindar in consideration of services rendered to him must have been exempted from the assessment; for otherwise the Government would lose the land-revenue in respect of that portion of the rent which is represented by the services. This argument assumes that the assessment is based entirely on the rent received by the Zamindar, irrespective of a consideration of such circumstances as might indicate that the rent so received does not represent the full rental value of the land. For this assumption I find no warrant either in the materials before us or in the methods of assessment usually adopted by the Government. So far as the materials before us warrant any conclusion on the point, there is no reason to suppose that lands paying a favourable rent to the Zamindar, should be assessed otherwise than on their full rental value: the rental value would be determined on a consideration of circumstances some of which would have no reference to the rent paid in money to the Zamindar: compare *Rajah Nilmoney Singh* v. *The Government*[1], *Rajah Nilmoni Singh* v. *Bakranath Singh*[2], *Rajah Venkatarangayya* v. *Appalarazu*[3]. If on the other hand such lands are burdened with services due to the Government and not to the Zamindar in his personal capacity, then the Zamindari would presumably be taxed only in respect of its interest in the lands *viz.*, the favourable rent.

Finally the District Judge has come to the conclusion that the services due from the lands were quasi public duties, and not such private services due to the Zamindar as the Court had to deal with in *Rajah Venkatarangayya* v. *Appalarazu*[3]. This decision is opposed to the view expressed by the Inam Commissioners in 1859.

1. (1866) 6 W. R. 121.
2. (1882) 9 I. A. 104 at p. 121.
3. (1910) 20 M. L. J. 728.

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If these services were due to the Government, some explanation ought to have been forthcoming of the circumstance that for over a century these lands were allowed by the Government to be held on a favourable quit-rent, though the services that were due from them were no more required by Government. The District Judge says that prior to the permanent settlement the Zamindars were collectors of revenue, and that the services due from the holders of the lands in the present case were in respect of collection of revenue and they fell into abeyance when the Government itself began to collect revenue. Had this been so then, the case would have been parallel to that contemplated in section 6 of Regulation XXV of 1802 which provides for the resumption of lands held on condition of performing police duties. The fifth report to the Circuit Committee to which the District Judge refers was not relied upon before us. On the materials before us I see no ground for supporting the conclusion that the services were of a public nature.

It seems to me, therefore, with every respect to the learned District Judge, that he has proceeded on entirely erroneous assumptions and that the conclusions drawn by him from the documents before him were opposed to law. The appeal must therefore, in my opinion, be allowed and the decree of the District Munsif restored with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

S. Srinivasa Aiyangar and others — *Defendants (Appellants.)*

v.

Radhakrishna Pillai — *Plaintiff (Respondent.)*

Transfer of Property Act Ss. 58 (b) (c), 98—Mortgage—Construction—Simple mortgage—Usufructuary mortgage—Mortgage by conditional sale—Combinations of—Anomalous mortgage—Hindu forms of mortgage by conditional sale—Effect of under the Act—Personal covenant—Covenant clogging equity of redemption.

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A mortgage which was described in the deed itself as an usufructuary mortgage contained a clause that if the mortgage amount was not paid on the stipulated date, the mortgage was to work itself out as a sale for the principal amount of the mortgage. In addition, there was a covenant at the end to the effect that the mortgagor should pay the costs of the constructions of earth work etc, effected on the land along with the mortgage money. Possession was given to the mortgagee.

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*C. M, A. No. 282 of 1912. 12th November 1913.

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Held: Per *Sadasiva Aiyar J.* that the mortgage was a combination of a simple and usufructuary mortgage with a covenant clogging the equity of redemption and that it was redeemable.

Per *Spencer J.* that it was either usufructuary mortgage with a covenant clogging the equity of redemption or a combination of an usufructuary mortgage with a mortgage by conditional sale in either of which cases it was redeemable.

Held: Per *Curiam*. The combination of a simple mortgage and an usufructuary mortgage or of the latter and a mortgage by conditional sale is not an anomalous mortgage under S. 98, Transfer of Property Act.

Amarchand v. Kilamorar[1] dissented from.

Per *Sadasiva Aiyar J.* Hindu forms of mortgages by conditional sale are not treated as such by the Act. They are either simple mortgages, or usufructuary mortgages or combination of both with a covenant in addition to clogging the equity of redemption,

Held: Per *Spencer J.* On a proper construction of the document, a personal covenant to pay the mortgage amount could not be inferred.

Appeal from the order of remand passed by the District Court of Trichinopoly in A. S. No. 435 of 1911 preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 18 of 1911.

T. Rangachariar and *N. Rajagopalachari* for Appellants.

S. Srinivasa Aiyangar and *K. V. Krishnasami Aiyar* for Respondent.

Mr. T. Rangachariar:—The District Judge finds that the transaction is a combination of usufructuary and conditional mortgages. Even on that finding it is anomalous. In S. 98 of Transfer of Property Act the words 'in the case of' ought also to be read before the words 'a combination of etc.' In *Amarchand* v. *Kilamorar*[1] a combination of simple and usufructuary mortgages was held anomalous. Otherwise also the transaction is an anomalous mortgage, being a combination of simple, conditional, and usufructuary. It is undoubtedly usufructuary as conceded by the opposite side It is also simple because there is a clear covenant to pay in two separate places in the document. One at the middle of the document *viz.*, 'Paying the amount...I shall redeem. If I fail to pay .... you shall enjoy the said properties according to the terms of absolute sale deed' and the other clause at the end in providing for the payment of improvements, *viz.*, 'I shall pay the said amount along with the mortgage money'. *Balasubramania Nadar* v. *Sivaguru Asari*[2] and *Ramabrahmam* v. *Venkatanarasu*[3]. The latter case

1. (1903) I. L. R. 27 B. 600.
2. (1909) 21 M. L. J. 562.
3. (1912) 23 M. L. J. 161.

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is conclusive on the point. The transaction also partakes of the nature of a mortgage by conditional sale, the terms of the document being identical with those in *Thumbusamy Moodelly* v. *Hossain Rowthen*[1] *Perayya* v. *Venkata*[2] and *Kola Venkatanarayana* v. *Vuppula Ratnam*[3]. It is thus an anomalous mortgage and falls within S. 98 of T. P. A. There is no right of redemption in an anomalous mortgage. Rights and liabilities of parties to such contracts are solely determined by their contracts. Equity of redemption does not form part of the common law of this country. It has been so laid down in *Pattabhiramaier* v. *Venkatarama Naidu*[4], *Thumbusamy Moodely* v. *Hossain Sahib*[1] *Ramasami Sastri* v. *Samiyappa Yakan*[5].

The learned Vakil also referred to *Gopalan Nair* v. *Kunhan Menon*[6].

S. Srinivasa Aiyangar:—The mortgage is not anomalous, nor if it be one is the equity of redemption taken away. S. 98 of T. P. A. cannot be read as the appellants want it to be read. To do so would be opposed to all rules of syntax. (Gour paragraphs 1603—1606) The two combinations specified are excluded from the class of anomalous mortgages. The transaction in this case is not an anomalous mortgage. It is an ordinary usufructuary mortgage with a covenant providing for absolute sale to the mortgagee on the happening of a condition. It is not a simple mortgage. There is no personal covenant to pay in the whole document. The two clauses relied upon by the appellants do not involve a covenant. One clause merely expresses the ordinary condition for redemption. That cannot be construed as implying a personal obligation. (See the observations of. *Bhashyam Aiyangar* J. in *Rangay Gurukkal* v. *Kalimuthu Amravi*[7]; also *Gopalasami* v. *Arunachella*[8] and *Shaik Idrus* v. *Abdul Rahiman*[9]. The other clause is strictly speaking no part of the mortgage transaction and cannot be relied upon for construing the document. Even if a covenant could be spelled out of the two clauses, that will not import a simple mortgage into the transaction; *Kashi Ram* v. *Sirdar Singh*[10]. The case reported in *Shaik Idrus* v. *Abdul Rahiman*[11] has no application to the present facts. Nor is the

1. (1875) I. L. R 1. M. 1.
2. (1888) I. L. R. 11 M. 403,
3. (1906) I. L. R. 29 M. 531.
4. (1870) 13 M. I. A 560.
5. (1881) I. L. R. 4 M. 179.
6. (1907) I.L.R. 30 M. pp 61 & 300.
7. (1903) 14 M. L. J. 61 s. c. I. L. R. 27 M. 526.
8. (1892) I. L. R. 15 M. 304.
9. (1891) I. L. R. 16 B. 308.
10. (1905) I. L. R. 28 A, 157.
11. (1903) I. L. R. 27 M. 526.

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transaction a mortgage by conditional sale. *Butchiraju* v. *Ramalingamurthi* [1]. It does not satisfy the terms of S. 58 cl. (c) of the T. P. Act. (See also *Narayana Iyer* v. *Venkatarama Iyer*[2] as to essentiality of form). There is no provision for judicial foreclosure as mentioned in S. 67 T. P. A. A covenant in a mortgage instrument making the mortgagee absolute owner of the property on the happening of any event is invalid *Samuel* v. *Jassah Timber and Wood Paving Corporation*[3]. The clause relied upon by the appellants is also a mere clog on the equity of redemption and is invalid: Halsbury p. 142 paragraph 274.

Even supposing that the transaction is combination of all the three forms of mortgages, it does not become anomalous. S. 98 of T. P. A. expressly excludes from the category of anomalous mortgages combinations of simple and usufructuary mortgages. That exemption *ipso facto* covers any combination in which both simple and usufructuary form a part.

Anomalous mortgagee is entitled to redeem (Cf. *Tukaram* v. *Ramchand*[4] *Mahmad* v. *Bagas* [5]. S. 58 of T. P. A. defines a mortgage and mentions 4 specific forms. S. 60 T. P. A. provides for redemption in all kinds of mortgages and does not expressly restrict the right to redeem only to the forms specified in S. 58. Equity of redemption is of the essence of a mortgage transaction. The observations in *Thumbusamy Moodely* v. *Hossein Rowthen*[6] only apply to certain transactions which were really sales with option to re-purchase. They have no bearing on the present case. (Mr. Srinivasa Aiyangar was here stopped in the course of his arguments).

The learned Vakil also referred to *Ramayya* v. *Guruna*[7] *Venkatasubbayya* v. *Venkayya*[8] *Jafer Husain* v. *Ranjit Singh*[9] *Perayya* v. *Venkata*[10] *Ramabrahmam* v. *Venkatanarasu*[11] *Balasubramania Nadar* v. *Sivaguru Asari*[12] in the course of his arguments.

T. Rangachariar briefly replied contending that the terms of the document resembled those in a Muddatakriyam and that the latter has been held to be a mortgage by conditional sale. *Thumbusamy Moodely* v. *Hossain Rowthen*[6], *Ramasami Sastri* v. *Samiappa Yakan*[13], *Perayya* v. *Venkata*[10].

1. (1903) 14 M. L. J. 337.
2. (1902) I. L. R. 25 M. 220.
3. (1904) A. C. 323.
4. (1901) I. L. R. 26 B. 252.
5. (1908) I. L. R. 32 B. 569.
6. (1875) I. L. R. 1 M. 1.
7. (1891) I. L. R. 14 M. 232.
8. (1891) I. L. R. 15 M. 230.
9. (1898) I. L. R. 21 A. 4.
10. (1888) I. L. R. 11 M. 403.
11. (1912) 23 M. L. J. 161.
12. (1909) 21 M. L. J. 562.
13. (1811) I. L. R. 4 M. 179.

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The Court delivered the following

Judgment:—*Sadasiva Aiyar* J:—This is an appeal against an order of remand. The appellants are the defendants.

The plaintiff sued for redemption of a mortgage created in 1884. This mortgage document (Exhibit A) begins by calling itself a usufructuary mortgage and in two or three places in the course of the deed, it is expressly called a usufructuary mortgage deed. It, however, contains a clause that if the mortgage amount was not paid on a date which is stipulated in the document at an interval of exactly nine years from the date of the document the mortgage was to work itself out as a sale for the principal amount due on the mortgage bond. Possession was given to the mortgagee in accordance with the nature of the document and its spirit. At the end, there is a covenant to this effect. "I, the mortgagor, shall pay to you the costs of the construction of earth work etc, on the date fixed for redemption as per your accounts along with the mortgage money."

The question is, what is the nature of this document? It is contended by the appellant's learned Vakil that this is a combination of three kinds of mortgages,—a simple mortgage, a usufructuary mortgage and a mortgage by a conditional sale. The plaintiff's contention, on the other hand, is that it is a usufructuary mortgage with a covenant at the end clogging the equity of redemption. I am inclined to think that it is a combination of a simple mortgage and a usufructuary mortgage with a covenant clogging the equity of redemption. I think it cannot be called a mortgage by a conditional sale, as it was executed after the Transfer of Property Act came into force, and it does not come within the definition of a mortgage by a conditional sale found in S. 58 cl. (c) of the Transfer of Property Act. There is no ostensible sale of the mortgaged property on the date of the document. It is what was known as the Hindu form of a mortgage by a conditional sale before the Transfer of Property Act was enacted; but it seems to me that the definition given in S. 58 cl. (c) of the Act was expressly framed so as to exclude this Hindu form of mortgage by conditional sale from the definition of mortgage by conditional sale in the Transfer of Property Act. That Hindu form of mortgage by conditional sale which began as a mortgage and worked itself out as a sale on breach of certain conditions by the mortgagor formed the subject of several decisions of the High Courts and the Privy Council, and because much confusion resulted from conflicts between those decisions, their

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Lordships of the Privy Council expressly stated in *Thumbusami Moodely* v. *Hussain Rowthen*[1] "An Act" of the Legislature "affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favour of mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law without injustice to any party." I think that the Transfer of Property Act, so far as the Hindu form of mortgage by conditional sale was concerned, treated it as a mortgage either simple or usufructuary according to its terms and treated the condition as to its afterwards working out as a sale as not enforceable by enacting S. 60 in the Act which gives to mortgagors generally a right to redeem. A mortgage deed which begins as a mortgage transaction cannot, in my opinion, be called a mortgage by conditional sale, though it is a mortgage which gives the mortgagee after a certain time and on breach of certain conditions by the mortgagor a right to claim a title as vendee. It is a mortgage with a clause providing for a future conditional sale and not a mortgage by means of a present sale transaction.

If, then, this document is not a mortgage by conditional sale, it is clearly a usufructuary mortgage according to the definition in S. 58 cl. (d) of the Transfer of Property Act. I think, that as there is the covenant at the end by the mortgagor which expressly says, "I shall pay some monies along with the mortgage money on the date of redemption" the document might according to its literal construction be treated as containing a personal covenant to pay the mortgage money; and following *Rama Brahmam* v. *Venkatanarasa Pantulu*[2] I would hold that, owing to the existence of that covenant, it is also a simple mortgage. Hence the document becomes a combination of a simple and usufructuary mortgage.

It was next contended that even a combination of a simple and a usufructuary mortgage is an anomalous mortgage under the definition of S. 98 of the Transfer of Property Act. That section is as follows: "In the case of a mortgage not being a simple mortgage or a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and so far as such contract does not extend, by

1. (1875) I. L. R. 1 M. 21 2. (1912) 23 M. L. J. 131.

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local usage." The construction sought to be put by the appellant's learned Vakil upon this section is that the words "in the case of a mortgage being" should be understood before the words, "a combination of the first and third." I do not think that this is a reasonable construction of the section. I think the meaning is "or in the case of a mortgage not being a combination etc."

Reliance was placed upon the decision in *Amarchand* v. *Kilamorar*[1]. In that case the respondent was not represented, and I think that that case was wrongly decided. Reference was also made to *Ramayya* v. *Guruva*[2]. No doubt there is an observation in that case that the Subordinate Judge who decided the case in the Lower Court treated the mortgage in question in that case as an anamolous mortgage; but I do not think that the learned judges of this Court intended to state that that opinion of the Subordinate Judge was correct. Again, reference was made to *Ammanna* v. *Gurumurthi*[3]. There is an observation there that the transaction evidenced by the document in question in that case was a mortgage by way of conditional sale as defined in S. 58, cl. (c) of Act IV of 1882. That observation was not necessary for the decision in that case, and with the greatest respect I dissent from that observation, though it seems to be accepted without criticism by Shephard and Brown (Page 238) and by Gour (paragraph 1044) in their Commentaries on the Transfer of Property Act. In the result I hold that the mortgage deed in this case is not an anamolous mortgage as defined in S. 98 of the Transfer of Property Act, but it is a combination of a simple mortgage and an usufructuary mortgage and hence that it is redeemable. That in the case of such a mortgage, the provisions of S. 60 would apply seems to me to be clear from the observations in p. 707 of Macpherson in his book on the Law of Mortgage. The case in *Perayya* v. *Venkata*[4] also shows that the right of redemption is not extinguished by the existence of a covenant at the end of the mortgage deed similar to the terms given in the present mortgage deed. See also *Ankimer* v. *Subbiah*[5] where even less onerous terms were held not to destroy the right of redemption.

In this view, it is not necessary for me to consider the question whether the learned District Judge was right in his view that, even if it was an anamolous mortgage, S. 60 of the Transfer of Property Act would allow the mortgagor to redeem the mortgage and that the terms of S. 98 should be read subject to the provisions of S. 60

1. (1903) I. L. R. 27 B. 600.
2. (1890) I. L. R. 14 M. 232.
3. (1892) I. L. R 16 M. 64.
4. (1888) I. L. R. 11 M. 403.
5. (1911) I. L. R. 35 M. 744.

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and other sections of the Transfer of Property Act. I need only, say that I would find it very difficult to hold that the express terms of S. 98 which are intended to apply specially to anamolous mortgages can be controlled by the provisions of previous sections of the Act which deal with other matters.

In the result I would dismiss the appeal with costs.

Spencer J :—I agree with my learned brother in the interpretation he has put on S. 98 of the Transfer of Property Act. I find it quite impossible to read the words " or a combination of the first and third, or the second and third, of such forms" as not being governed by the negative which comes at the beginning of the sentence. If a different construction is to be put upon this section it would be necessary to imply the words "in the case of" between the words " or" and " a combination" etc. This would be a violation of the meaning of the plain English of the sentence. I am unable to follow the statement of the learned Judges who decided *Amarchand* v. *Kilamorar*[1] that a combination of a simple mortgage and a usufructuary mortgage is an anamolous mortgage provided for by S. 98. Mr. Gour in paragraph 1603 of his book on the Law of Transfer in British India treats this statement as an oversight and in paragraph 1606 speaks of there being six and only six forms of mortgages eliminated by this section from the category of anamolous mortgages.

As regards the mortgage deed Ex. A, as I read the document I am inclined to treat it as either a usufructuary mortgage deed with a clause containing a clog on the equity of redemption, or a usufructuary mortgage deed combined with a mortgage by conditional sale. In either case, it will be subject to the conditions of S. 60 of the Transfer of Property Act, and no act of the parties other than a transaction outside the mortgage deed itself will extinguish the right of redemption. Vide *Perayya* v. *Venkata*[2].

The words which provide for the payment of repairs, improvements etc., along with the mortgage money are evidently intended to take effect in the event of the mortgage being redeemed. I do not consider that they constitute a personal undertaking to pay, nor are there any other words in this document which can be construed as a personal covenant, express or implied to pay the mortgage money. Compare *Gopalasami* v. *Arunachella*[3]. In this respect this case may be distinguishable from that of *Kangayya Gurukkal* v. *Kalimuthu Annavi*[4], in which a personal promise to

1. (1903) I. L. R. 27 B. 600.
2. (1888) I. L. R. 11 M. 403.
3. (1892) I. L. R. 15 M. 304.
4. (1903) I. L. R. 27 M. 526.

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pay was contained in the words " We shall cause Rs. 200 to be paid and we shall redeem our land."

If S. 58 cl. (c) of the Transfer of Property Act is to be read strictly, it is necessary that there should be an ostensible sale of the mortgaged property to constitute a mortgage by conditional sale. There are no words in Ex. A. which by themselves create a sale; but the document implies that, if payment is not made by the stipulated date, the property shall be held and enjoyed by the mortgage as if he had obtained it by absolute sale. In some cases, such words have been treated as a mortgage usufructuary by conditional sale. Instances are given in paragraph 1605, p. 1025 of of Mr. Gour's book. The next paragraph describes anamolous mortgages.

In *Tukaram* v. *Ramchand*[1], the document which passed the ownership of the property usufructuarily mortgaged in case of failure to pay the mortgage money on the prescribed date, was construed, as an anamolous mortgage. But in that case, the usufructuary mortgage seems to have been combined with a lease and that may have led the learned Judges to treat it as an anamolous mortgage. Whether the present document be treated as an usufructuary mortgage combined with a mortgage by conditional sale, as the Lower Appellate Court treated it, or an usufructuary mortgage with a clog on the equity of redemption,—in either case, the Judgment of the Lower Appellate Court will have to be upheld and this appeal dismissed with costs, and I therefore, agree in the order proposed by my learned brother.

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1. (1901) I. L. R. 26 B. 252.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court at Calcutta.]

Present:—Lords Shaw and Moulton, Sir John Edge and Mr. Ameer Ali.

Rajkumari Bhubaneshwari Kumar ... *Appellant.**

v.

The Collector of Gaya ... *Respondent.*

Act XI of 1899 Sec. 19 H, cl. 4. and Sub-Section 4—Indian Succession Act, 1865 Sec. 277—Probate and Administration Act Sec. 98—Inventory—Essentials.

Bhubaneshwari v. The Collector of Gaya.

Papers lacking the essential detail of a "full and true estimate of all the property in possession" cannot have the effect of an inventory contemplated by S. 98 of the Probate and Administration Act, so as to preclude the Collector from moving for an inquiry as to the valuation of the estate more than six months after their production under S. 19—H of the Court Fees Act.

Appeal from a Judgment and Order of the High Court dated May 25, 1909 affirming a Judgment and Order of the District Judge of Gaya dated September 23, 1908, and March 2, 1909.

One Raja Ram Bahadur Sing of Tekari, who died on March 31, 1890, by a will dated March 23, 1890, devised certain Villages to Mussammat Rameshwar Kumar, his son's widow, the appellant for her maintenance, with residue to her daughter Raj Kumari Ratan Kumar. On April 7, 1890 the latter applied to the Court of the District Judge of Gaya for letters of administration with the will annexed to the estate of the Raja which was stated to be worth 11 lakhs. The District Judge held the will not proved but on appeal to the High Court the will was held to be genuine, which was affirmed by the Privy Council on December 8, 1894.

Raj Kumari Ratan Koer died on May 26, 1893, having appointed her mother Mussammat Rameshwar Kumar and her husband Rajeshwari Prasad Narayan Singh, the executrix and executor respectively who applied for the Probate of the will. This was granted on January 31, 1896 and court fees stamps were paid to the amount of Rs. 22,000. The executor having died, the exe-

*7th November 1913.

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cutrix applied for the probate of the will of her husband, the Raja, on Aug. 13, 1902. An order was made for the Letters of Administration to issue and for notice to be given to the Collector of Gaya under the Court Fees Amendment Act (XI of 1899, Sec. 19 H. cl. 2). The Collector asked for a copy of the list of properties of the estate and their valuation. The District Judge replied that there was no such list. A list of immoveables was, however, filed but repeated attempts on the part of the Collector to obtain inspection of the moveable properties were systematically frustrated by the executrix. On June 7, 1907 a notice was issued to her to file an inventory for the cancelment of which she applied on the ground that according to law she should not be called upon to file an inventory for the list of immoveables was already put in and there was a list of moveables already on record. The District Judge thougbt that an inventory was filed but on December 19, 1909 Raj Kumari Buvaneshwari Kumar filed a suit against the Executrix for accounts and other reliefs, accusing her of committing acts of waste. The Collector again applied to the District Judge for an inventory under S. 98 of the Probate and Administration Act without any result; but on June 8th 1908 he issued a notice to the executrix under Act XI of 1899 Sec. 19 H. clause 3 calling upon her to pay the balance of Court fee on the full and real value of the undervalued property. On July 16, 1908 the Collector under cl, (4) of Sec. 19 H. of Act XI of 1899 applied to the District Judge to inquire into the valuation of the said estate and on July 16, 1908 a notice was issued to the executrix to appear at the inquiry. She objected to the inquiry, but the District Judge decided against her. A commissioner who was appointed to inquire into the valuation, made his report in due course. The District Judge made his final orders on the strength of the Report on March 2, 1909 directing the executrix to pay the amount of Court Fees on the balance between the actual value and the under-estimated value of the properties. On April 29, 1909 the appellant applied for and obtained from the High Court exercising its Revisional Jurisdiction a Rule *nisi* under Sec. 115 of the Code of Civil Procedure on the respondent to show Cause why the said order should not be set aside on the ground of material irregularities committed by the District Judge, who showed cause against the Rule *nisi* and the High Court discharged the same with costs on March 25, 1909. Against the order of the High Court this appeal was preferred to the Judicial Committee by the appellant.

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De Gruyther K. C. and *Dube* for appellant contended that the inventory was actually filed and was on record. The District Judge had no jurisdiction to go behind the orders of his predecessor in office and order the holding of an inquiry. He had no power to entertain respondent's application under Act XI of 1899. The principle on which the valuation was based was wrong.

Sir E. Richards K. C. and *Dunne* who appeared for the respondent were not called upon to reply.

The Judgment of their Lordships was delivered by

Lord Shaw :—This is an appeal from a Judgment and Order of date the 25th May 1909, which was pronounced by the High Court of Judicature at Fort William in Bengal, and which affirmed a Judgment and Order of date the 23rd September 1908, and the 2nd of March 1909, of the District Judge of Gaya.

The present proceedings were instituted on the 16th of July 1908 by an application which was made by the Collector to the District Court under Section 19 H, Clause 4, of Act XI, of 1899. Before reading that Section, it may be stated that the general nature of the application was to declare that no inventory of the estate of the deceased as required by law had been filed and that the appellant was not willing to amend the valuation of the estate to the satisfaction of the Collector.

In the defence lodged to those proceedings, this declaration and inability were reaffirmed by the appellant and accordingly the proceedings have taken their course.

The Section of the Act of 1899 to which particular reference is made defines the function of the Collector in the following terms.—
" The Collector, within the local limits of whose revenue-juris-
" diction the property of the deceased or any part thereof is, may
" at any time inspect or cause to be inspected, and take or cause to
" be taken copies of the record of any case in which application for
" probate or letters of administration has been made, and if, on
" such inspection or otherwise, he is of opinion that the petitioner
" has underestimated the value of the property of the deceased, the
" Collector may if he thinks fit, require the attendance of the
" petitioner (either in person or by agent) and take evidence and
" enquire into the matter in such manner as he may think fit, and,
" if he is still of opinion that the value of the property has been
" under-estimated, may require the petitioner to amend the valu-
" ation,"

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The Collector having a strong opinion as to the valuation emerging as a lump sum in the previous proceeding, initiated these proceedings, under discussion. What the appellant before their Lordships pleads is that the action or proceeding on the part of the Collector is excluded by the proviso of sub section 4 of the Statute last quoted. That proviso is " that as such motion shall be made " after the expiration of six months from the date of the exhibition " of inventory required by Section 277 of the Indian Succession " Act, 1865, or, as the case may be, by Section 98 of the Probate " and Administration Act, 1881."

It is in the opinion of their Lordships, not a justifiable construction of this proviso to date the period of running from anything less than the lodging of the inventory required by the Statute. It will not satisfy this proviso that six months have elapsed from a period when a certain document, which might be classed as or denominated an inventory, satisfied a District Judge or any Judge. What he has to be satisfied of is that the *functum temporis* from which the six months runs is the lodging of an inventory as required by S. 98. It was admitted by the learned Counsel for the Appellant that accordingly the correct decision to be arrived at here depended upon the construction of certain words in S. 98 ; and as those are of general importance, the following citation is made:—
" An executor or administrator shall, within six months from the grant of probate or letters of administration, exhibit in the Court by which the same has or have been granted an inventory containing a full and true estimate of all the property in possession, and all the credits and also all the debts owing by any person or persons to which the executor or administrator is entitled in that character."

The remainder of the section has no bearing on the subject in dispute in these proceedings.

Their Lordships are clearly of opinion that no inventory satisfied this statutory requirement which omits the essential of this detail, namely that its contents shall include a full and true estimate of all the property in possession. This being the statutory provision it is not alleged by the appellant that any one document did contain such a full and true estimate. The argument presented to their Lordships was that by massing together a variety of documents, including two which will now be referred to, and a mass of documents in another case, none of which have been brought in detail before the notice of the Board there was, in the result produced to the Court an inventory containing a full and true estimate.

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In their Lordships' opinion the first objection to this operation, even although the operation itself as distinguished from the production of one document containing the details were legitimate, is that the first document to which reference is made is a list of the immoveable property belonging to the deceased. It has been not obscurely suggested in these proceedings that the immoveable property bore the relation to the moveable property of no less than at least nine in ten. So that with regard to nine-tenths of the estate of the deceased nothing is supplied except a list of the properties, a list without a single figure, and containing nothing, even by approximation of the words of the statute, in the nature of a full and true estimate of the property in possession.

In their Lordships' opinion that is sufficient for the disposal of the case. Their Lordships are satisfied that a just conclusion has been arrived at by the Courts below, and they will therefore humbly advise His Majesty that this appeal should be dismissed and that the appellant should pay the costs.

Solicitors for Appellant:—*W. W. Box and Co.*

Solicitor for Respondent:—*India Office.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

Devaguptayu Bhaskarudu... *Appellant** *(2nd Plaintiff).*

v.

Pamarthy Subbarayadu and the Secretary of State for India in Council. *Respondents.* *(1st Plaintiff and Deft.)*

Bhaskaradu v. Subbarayudu.

Madras Act III of 1905 S. 14—Land Encroachment Act—Suit for declaration of title—Levy of penalty for encroachment on land—Limitation, six months as provided in the Act.

Where a person from whom penalty is levied under the Land Encroachment Act brings a suit for declaration of title to the land in dispute the suit will be governed by the six months' limitation provided in the Act.

Second appeal from the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 108 of 1911 (Referred A. S. No. 118 of 1910 District Court of Godaveri) preferred against the decree of the Court of the District Munsif of Rajahmundri in O. S. No. 240 of 1909.

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*S. A. No. 1517 of 1912. 12th November 1913.

G. Venkataramiah for Appellant.

The Govt. Pleader for Respondent.

The Court delivered the following

Bhaskaradu v. Subbarayudu.

Sankaran Nair J.

Judgment:—*Sankaran Nair J*:—The suit is brought by the plaintiff against the Secretary of State for a declaration of his title to certain property and for the recovery of the penal assessment levied on him by Government under S. 5 of Madras Act III of 1905. The Government claim it as Government land. The suit was dismissed by the Lower Appellate Court on the ground that it is barred by limitation under S. 14 of Act III of 1905. In second appeal it is contended that the prayer for declaration is not barred. The claim to recover the amount levied as penal assessment is not pressed in Second appeal. Under S. 3 of Act III of 1905 the Government is entitled to levy an assessment on land which is unauthorizedly occupied by any person if such land is the property of Government. Under S. 5 in addition to the assessment under S. 3 the Government is entitled to levy a penalty. Then S. 14 confers a right to sue upon the person from whom the assessment is levied. Such suit must be brought within six months—see the 'explanation' to the section. This suit is admittedly brought after the six months prescribed by that section. Then S. 6 declares that the Government may summarily evict the person who is occupying the Government land without their consent. S. 14 gives a right of suit to the person so evicted and under the section read with the explanation that suit must be brought within six months of the eviction. In the case before us there has been no eviction and therefore the 'explanation' does not apply to this suit.

S. 14 declares that any suit which may be brought by a person aggrieved by any proceeding under the Act must be brought within six months from the time the cause of action arose. If therefore it is any proceeding under the Act which gives a cause of action for the suit, it must be brought within six months of the date of that proceeding. The cause of action is stated in the plaint to be a proceeding under the Act *i.e.*, the notice and the levy of penal assessment and the suit was brought more than six months afterwards.

The contention before us is that the suit for declaration may be brought within the ordinary period of limitation and reliance is placed upon the decision in *Narayana Pillai* v. *Secretary of State for India*[1]. It is urged that such suit is maintainable as the title

1. (1912) 23 M. L. J. 162.

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of the plaintiff is not lost till 6 months have expired from the date of eviction. It may be that the plaintiff has a cause of action to bring a suit within six months of the levy of the penal assessment from him in any year to recover the amount so levied, so that, if the plaintiff is compelled to pay any assessment next year or the year after, it is possible that he may have a right to bring the suit within six months from that date. On that point it is unnecessary for us to give any opinion.

It may also be, as contended by the appellant, that, if the Government evict him at some future time from this land, he may have a right to bring a suit within six months from that date of eviction to recover possession of the land and that, therefore, it cannot be said that he would lose his title to the land till that period has expired. But that again is not the question that we have to consider. The question that we have to consider is when did the cause of action arise for this suit, and whether it is barred under S. 14. And the cause of action for this suit for the declaration certainly arose as stated in the plaint, when the Government denied their title to the property or levied the penal assessment from them. If the plaintiff did not feel himself aggrieved by the notice or levy of the penal assessment, he was not bound to bring a suit for declaration. He might wait till any further action taken by Government which gives him a right of suit. But as he alleges that it was a proceeding under this Act i-e, notice to quit the land etc., that gives him a cause of action, he was bound to bring his suit within six months from the date of the act alleged to give him a cause of action though his title to the property may not have been lost. In the plaint it is said that the cause of action arose on or before the 23rd March 1908. The suit is admittedly brought six months after those dates. The Judge is right, therefore, in holding that the suit for the declaration of title is barred, and we accordingly confirm the decree and dismiss the appeal with costs.

Bakewell J :—I entirely agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Ralph Benson officiating Chief Justice and Mr. Justice Napier.

Vijiaraghavalu Naidu and another *Petitioners.** (*Sureties*)

Vijiaraghavalu Naidu *In re*

Criminal Procedure Code—Bail bond—Sureties—Suicide by accused—Forfeiture of.

A bail bond given by sureties for the appearance of an accused person is not liable to be forfeited because the accused having committed suicide they are unable to produce him.

Petition under Ss. 435 & 439 of the Criminal Procedure Code praying the High Court to revise the order of the Court of the Chief Presidency Magistrate, Egmore in the matter of a bail bond entered into by the late Venkatasami Naidu (accused) and his sureties the petitioners herein in the said Court.

Dr. S. Swaminathan instructed by *Messrs. Short and Bewes* for the Petitioners.

J. C. Adam for the Crown.

The Court made the following

ORDER :—The facts in this Revision petition are as follows:—One Venkatasami Naidu was charged before the Chief Presidency with an offence under S. 415 of the Indian Penal Code; he was released on bail and the two petitioners signed a bond for his appearance in the sum of Rs. 2,500 each; the accused committed suicide before the date of surrender; the Chief Presidency Magistrate called on the sureties to show cause why their bail should not be forfeited and, after arguments decided that they were liable on the ground that the suicide of the accused was a preventible reason for his non-appearance and one which they should have a made themselves aware of and guarded against. It was first argued on this petition that the Chief Presidency Magistrate approached the question from the wrong point of view and that he should have held that the accused had not failed to attend and that death prevented his attendance. We intimated at the hearing that we were unable to accept this view and Dr. Swaminathan was unable to show how a permanent incapacity to attend caused by the act of the accused could be distinguished from a temporary incapacity owing to the same causes. In our opinion the Chief Presidency Magistrate considered the liability of the sureties from the right

*Cr. R. C. No. 169 of 1912 and Cr. R. P. No. 135 of 1912.
21st August 1912.

Vijiaraghavalu Naidu *In re*

point of view. But the question to be decided is whether he was right in the view he took of the sureties' liability. Mr. J. C. Adam who appeared for the Crown Prosecutor contended that sureties must be taken to guarantee the appearance of the accused subject to the act of God and the act of the State of which the accused is a subject. He has invited our attention to a large number of English authorities including very properly some which did not support his contention. The decision in civil cases against the surety rest on the well-established principle that where one of the two persons must suffer it should be the person through whose instrumentality, however innocent, the loss can be said to have arisen, but we do not think that this principle applies in criminal cases.

We do not propose to deal with all the cases quoted but only those which are sufficient to establish the proposition required for our decision. *Merrick* v. *Vaucher*[1] was an application by the bails for an exoneration entered into upon several bail pieces on the ground that the defendant had been sent out of England under the Alien Bill, 33 Geo. III ch. 4. Lord Kenyon stated the law as follows: "The bail only engaged for the principal in the then situation of the parties: but it is now become impossible for them to render the principal, and this impossibility does not arise from any act which they could control, but from the operation of an Act of Parliament. These bails therefore, to whom no fault or neglect whatever is imputable ought not to suffer in consequence of an Act which was passed for the benefit of the public."

This is exactly the proposition stated by the Chief Presidency Magistrate and it is to be noted that the test applied by the Chief Justice was whether any default or neglect is imputable to the bail. The same view was evidently adopted by the Court of Kings Bench in *Folkein* v. *Critico*[2] which was an application by a bail in like circumstance though the principle is not clearly stated.

The next question is whether there was a duty cast on the bail to guard the accused so closely that he could not commit suicide. Here is no direct authority on the point, but the case of *Robertson* v. *Patterson*[3] supplies the answer. In that case the defendant being a seaman had been arrested at the suit of the plaintiff for a debt and was released on bail; after which he was impressed into His Majesty's service. The defendant's bail applied for a Habeas Corpus directed to the commander of the ships to bring him up for the purpose of being rendered in discharge of his bail. A rule nisi was

1. (1794) 6 Term Reports p, 50; 101 E. R. 429.
2. (1811) 13 East p. 457 s. c. 104 E. R. 448.
3. (1806) 7 East 405; 103 E. R. 157.

Vijiaragha-valu Naidu *In re*

obtained for entering on exoneration on the bail piece. The Court thought it unnecessary to issue the writ of Habeas Corpus but at once entered on exoneration upon the bail piece. Now it is clear that it would have been in the power of the sureties to prevent the accused being impressed. All that they had to do was, what the Chief Presidency Magistrate seems to think the sureties in this case ought to have done viz., guarded him carefully and confined him so that he should never be in any public place where he could be impressed. It appears to us that the effective steps to prevent impressment would be more easily taken than steps to prevent suicide. Mr. Adam contended that the accused was actually in the custody of his bails. If that is so under the present form of surety bond, it was certainly so in 1806 when this person was impressed into His Majesty's service. Mr. Adam has argued with considerable force that the bailing of the accused gave him an opportunity to commit suicide and it was necessary to enforce the liability of the sureties so as on the one hand to make them understand the grave risk which they run in entering into these bonds and on the other hand to impress upon persons accused the serious reponsibility which they would throw on their sureties if they made away with themselves. These considerations are however germane to all cases where the accused or defendant has allowed himself to be arrested or impressed. But we do not find that the Court of King's Bench has proceeded on this view. In our opinion the fact that the sureties did not take steps to prevent the accused from committing suicide even though the possibility of his doing so may have passed through their minds does not amount to such neglect or default as to make them liable on the bond. The question we have to decide has quite recently come before a Bench of the Calcutta High Court (*Narisingha Deb Chatterjee* v. *The King Emperor*[1]) which decided that where an accused commits suicide the sureties are not liable for the default in his appearance. For the reasons stated above we have come to the same conclusion. We set aside the order of the Chief Presidency Magistrate and direct that the sureties be discharged from their liability under the bail bond.

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1. (1912) 16 C. W. N. 550.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justicc Miller, and Mr. Justice Sadasiva Aiyar.

Muthurakkµ Maniagaran — *Appellant** (*Plaintiff*)

v.

Rakkappa Maniagaran and others — *Respondents.* (*Defendants.*)

Contract Act S. 69—" Interested "—" Bound by law to pay"—Mortgage—Sale of part free of encumbrance-Sale of remainder—Purchase money left with vendee to discharge mortgage—Failure of vendee to discharge—Payment by first vendee—Rights of—Right in equity to stand in the shoes of vendor—Contribution—No right against person of second vendee.

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Plaintiff's father purchased a portion of certain property under mortgage under circumstances showing that it was to be free of the mortgage. On the next day 2nd defendant purchased the remaining portion, part of the purchase money was left with him to discharge the mortgage. 2nd defendant having failed to discharge the mortgage, the mortgagee brought a suit and though the plaintiff's father was personally exonerated, a decree was passed ordering the sale of the whole of the mortgaged property. When the properties were accordingly put up for sale, plaintiff paid off the decree and brought the present suit to recover the amount. The Munsiff passed a decree against the 2nd defendant. On appeal the District Judge held that there being no privity of contract between plaintiff and the 2nd defendant plaintiff was not entitled to recover the whole of the amount paid but was entitled only to contribution and remanded the suit.

Held on appeal, that the plaintiff was entitled to recover the entire amount, though not personally but only from the property in the hands of the 2nd defendant.

Held por *Miller* J. That he was entitled to recover under S. 69 of the Contract Act.

Per *Sadasiva Aiyar* J. That he was entitled to recover under that section or under S. 70.

That he was also entitled in equity to stand in the shoes of the mortgagor and to recover compensation for the defendant's failure to perform his obligation to discharge the mortgage.

The words " interested " and " bound by law to pay " in S. 69, considered.

Per *Sadasiva Aiyar* J : As the judgment of the lower court was not on a preliminary point, the order of the Judge remanding the suit was in any event wrong.

Appeal from the order of the District Court of Tinnevelly in A. S. No. 218 of 1911, preferred against the decree of the Court of the District Munsif of Tuticorin in O. S. No. 311 of 1910.

S. Srinivasa Aiyar, for Appellant.

K. N. Aiya for Respondent.

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*A. A. O. No. 51 of 1912. 19th September 1913.

Muthurakku Maniagaran v. Rakkappa

Miller J.

The Court delivered the following

Judgment:—*Miller J.*;—This appeal, I think, must succeed, and I put my decision on Section 69 of the Contract Act.

The 2nd defendant bought subject to the whole mortgage and was bound by law to satisfy the mortgagee himself either by payment or by suffering a sale of that part of the mortgaged property which was sold to him. The fact that a portion of the property had the previous day been transferred to the plaintiff did not affect that obligation : the property purchased by the plaintiff was rightly or wrongly ordered to be sold under the decree, and the plaintiff, to save the sale, paid the whole of the mortgage money. He was, I think, interested in making the payment : and the 2nd defendant was bound by law to pay : there seems to be nothing more required to attract the provisions of Section 69.

The District Judge recognises that Section 69 would apply to the case, but fails to see that the 2nd defendant was bound by law to pay the whole mortgage money and not only his proportionate part thereof.

I agree in the decree which my learned brother proposes to make.

Sadasiva Aiyar J.:—The learned District Judge has reversed the District Munsif's Judgment and remanded the suit to the Court of First Instance for the purpose of deciding the suit on the basis that the plaintiff's claim is one for contribution from the 2nd defendant in respect of monies paid by the plaintiff to a mortgagee of both the 1st and 2nd schedule properties.

The material facts are shortly these. The 1st defendant was the owner of both the schedule properties. He sold the 1st schedule properties to the plaintiff's father on the 31st July 1895, the circumstances showing that it was to be a sale freed from the prior encumbrance of 1889 in favour of a Zemindar. On the next day, *i. e.*, the 1st August 1895, he sold the 2nd schedule properties to the 2nd defendant, part of the purchase money being left with the 2nd defendant in order that he might discharge the Zemindar's mortgage of 1889. The 2nd defendant failed to discharge the Zemindar's mortgage of 1889. The Zemindar brought a suit against the 1st defendant and the plaintiff's father in 1901 for sale of both the 1st and 2nd schedule properties and for personal decrees against the 1st defendant and against the plaintiff's father. The plaintiff's father, however, was dead when the suit was brought and so the decree in that suit of 1901 exonerated the plaintiff's father and his

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Sadasiya Aiyar J.

interest (if any) in the properties from all liability but ordered the sale of both the 1st and 2nd schedule properties, and further gave a personal decree against the 1st defendant for the mortgage money due to the Zemindar.

It is clear that a sale under such a decree could not at all affect the title of the plaintiff's father (or rather of the plaintiff, who had become the heir of his father) in the 1st schedule properties, as his father's rights were expressly exonerated by the decree. But when the 1st schedule property was brought to sale in execution of the Zemindar's decree in the suit of 1901, the plaintiff paid up the whole amount to save the 1st schedule property from sale and brought the persent suit for recovery of the sum so paid on the charge of the 2nd schedule properties and from the 1st defendant personally. The District Munsif dismissed the suit as against the 1st defendant but gave a decree on the charge of the 2nd defendant's 2nd sehedule properties for the sum of Rs. 260 with interest at 4 per cent. per annum from the 16th December 1908 till date of decree and at 6 per cent. from date of decree. The District Munsifs's decree seems also to give a personal remedy against the 2nd defendant for the amount decreed.

On appeal by the 2nd defendant to the District Court, the learned District Judge held that, as there was no privity of contract between the plaintiff's father and the 2nd defendant, though the 2nd defendant had promised to the 1st defendant to discharge the Zemindar's mortgage, the plaintiff cannot recover the whole amount which he paid to the Zemindar (mortgagee-decree-holder) from the 2nd defendant and the 2nd schedule properties, but can only recover contribution from the 2nd defendant in the proportion of the value of the 2nd defendant's property to the value of the 1st and 2nd schedule properties together. The learned District Judge held that Section 69 of the Contract Act could not help the plaintiff.

In Second Appeal the plaintiff's learned Vakil contended

(*a*) that the District Judge ought to have found that there was privity of contract between the plaintiff's father and the 2nd defendant;

(*b*) that under Sections 69 and 70 of the Contract Act, the plaintift was entitled to recover the whole of the Rs. 260 etc. from the 2nd defendant;

(*c*) that under the general law he was so entitled;

(*d*) that the District Judge should have given a decree against the 1st defendant though the plaintiff had not appealed to the District Court against the Munsif's Judgment exonerating the 1st defendant;

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(*e*) and that in any event, the order of reversal and remand passed by the District Judge is wrong, as the Munsiff had not decided the suit on any preliminary ground.

Taking the last contention first, it is clear from the decision in *Nabin Chandra Tripati* v. *Kali Kumar Das*[1], that the Lower Court, even on the view held by it on the facts and the law, could have only called for findings from the Court of First Instance as to the contribution which the 2nd defendant and the 2nd schedule properties were liable to make to the plaintiff and could not have reversed the judgment of the Court of First Instance and remanded the suit wholly. The Lower Court's order therefore should be reversed in any event.

As regards the first contention, it is a question of fact whether there was a privity of contract between the plaintiff's father and the 2nd defendant, and I am not prepared to dissent from the finding of the Lower Appellate Court that there was no such privity of contract.

Then there remain three questions of law. I shall take the contention (*d*) first. The District Judge was no doubt entitled to give a decree aginst the 1st defendant though the plaintiff had not appealed against the Munsif's decision exonerating the 1st defendent (see order XLI Rule 33). But I am not inclined to say in this case that the Lower appellate Court should have given such a decree against the 1st defendant, as it was the default of the 2nd defendant in not paying to the Zemindar (mortgagee) (in accordance with the 2nd defendant's promise given to the 1st defendant) that has caused all this trouble and the 1st defendant was really innocent of any fraud against the plaintiff.

Then we have only to consider the two contentions (b) and (c) which for ready reference might be here re-stated.

(b) That under Sections 69 and 70 of the Contract Act, the plaintiff was entitled to recover the whole money from the 2nd defendant;

(c) that under the general law, he was so entitled. I think both these contentions ought to prevail. It has been held by the Allâhabad High Court (*Hakim Ali Khan* v. *Dalip Singh*,[2]) that when the plaintiff purchased a property from the mortgagor, owner, when the defendant had (for consideration) promised to the mortgagor to discharge the mortgage, and had failed to so discharge the mortgage, and when in consequence of such failure the plaintiff was obliged to pay up the mortgage money to the mortgagee who had

1. (1913) 18 C.L.J. 613; 20 I.C. 39. 2. (1913) 11 A.L.J. 478, 19 I.C. 676.

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obtained a decree on his mortgage, the plaintiff was entitled to recover the money so paid by him from the defendent. The plaintiff's right in such a case is based by the learned Judges on the ground that the plaintiff was entitled to stand in the shoes of the original owner (mortgagor) and as that mortgagor had a right as against the defendant to recover the money which the defendant had failed to pay to the mortgagee and had thus committed a breach of the contract with the mortgagor (owner), the plaintiff, standing in the shoes of the mortgagor, was entitled to recover compensation from the defendant just as the plaintiff's vendor (the original mortgagor) could have recovered it from the defendant. This reasoning appears to me to be in consonance with justice, equity and good conscience. I would therefore uphold the contention (c) of the appellants in this case. Again coming to the contention (b), it has been held in *Debnarain Dutt* v. *Ramadhan Mondol*[1], that, where a sum was payable by the defendant under a contract with (A) for the benefit of (B) *i. e.*, where defendant had promised to (A) for consideration to pay a sum of money to (B), (B) could enforce the contract. Lord Hatherley's observations in *Touche* v. *Metropolitan Railway warehousing Company*[2], are quoted in support of the said proposition. Applying this principle, it seems to me that the Zemindar mortgagee could have obtained a decree against the 2nd defendant for the money which the 2nd defendant agreed with the 1st defendant to pay to the mortgagee at the time of the sale by the 1st defendant to the 2nd defendant of the 2nd schedule properties.

The second defendant having been thus bound to pay to the Zemindar (mortgagee) the whole amount of the mortgage money and the plaintiff being interested in the 2nd defendant's payment of such money to the Zemindar (mortgagee) and the plaintiff having paid such money, it seems to me that Section 69 of the Contract Act directly applies in the plaintiff's favour. In *Vaikuntam Aiyangar* v. *Kallipiran Ayyangar*[3], *Subrahmania Aiyar* and *Davies* JJ. held that a Hindu widow who was interested in her daughter's welfare and therefore spent money for the marriage expenses of her daughter which her husband's brother was legally bound to incur, could under S. 69, recover the money from the husband's brother. In *Subramania Iyer* v. *Rungappa Reddi*[4] *Benson* and *Krishnaswami Aiyar* JJ. held that even if the plaintiff had merely an apprehension of any kind of loss or inconvenience or even of

1. (1913) 17 C. W. N. 1143. 2. (1871) 6 Ch. A. 671.
3. (1903) I. L. R. 26 M. 497 ; 13 M. L. J. 25.
4. (1909) I. L. R. 32 M. 232 ; 19 M. L. J. 750.

any detriment by the non-payment of a debt due by a 3rd person to another, the plaintiff was "interested" in paying that debt of that third person and, if he discharges it, he could rely upon S. 69 of the Contract Act. Even if *Vaikuntam Aiyangar* v. *Kallipiram Aiyangar*[1] goes a little too far in considering that an interest other than a pecuniary interest will do to attract the provisions of S. 69, 32 Mad. 232 is clear authority for the proposition that pecuniary interest even in the shape of detriment or inconvenience will entitle the plaintiff to take advantage of S. 69 of the Contract Act (see also *Tulsakunwar* v. *Jageshar Prasad*[2] and *Ranganaikammal* v. *Ramanuja Aiyangar*[3].

In *Bhadra Mhamed* v. *Gunamoni Pali*[4] the facts were as follows:—The plaintiff whose property was about to be sold by the landlord for a sum which was solely due by the defendant as between the plaintiff and the defendant paid that sum to the landlord. The sum was charged both upon the plaintiff's interest and upon the defendant's interest in certain properties. On these facts the plaintiff was entitled to recover the whole from the defendant under S. 69 of the Contract Act. The learned Judges further held in that case that even if S. 69 of the Contract Act did not apply, S. 70 applied in the plaintiff's favour because the payment was not voluntary, as the plaintiff's property was about to be sold, the payment was a lawful act by the plaintiff and the defendant reaped its benefit as the debt due by him was therefore discharged. (See also *Rauhaya Lal* v. *The National Bank of India, Limited*[5] to what is a voluntary payment). In *Kutti Goundan* v. *Mahali Ammal*[6] *Sundara Aiyar* and *Spencer* JJ. held that even a contingent reversioner after the death of a widow under the Hindu Law, who pays a mortgage debt to save a property from sale under a mortgage decree, obtains a lien on the property which was cleared of the mortgage debt, and S. 69 of the Contract Act has also been relied upon by both the learned Judges. In *Joy Narain Singh* v. *Badri Das*[7] S. 70 of the Contract Act is relied upon to establish the right of a mortgagee who paid a decree passed against the mortgagor under S. 161 of the Bengal Tenancy Act. In *Sri Sri Sri Gajapathi Krishna Chandra Deo* v. *Srinivasa Charlu*[8] decided by my learned brother and myself, I have ventured to make some observations indicating that S. 69 and 70 of the Contract Act should be liberally interpreted to advance substantial justice. In the result,

1. (1902) I. L. R. 26 M. 497.
2. (1906) I. L. R. 28 A. 563.
3. (1911) 21 M. L. J. 600.
4. (1911) 11 I. C. 156.
5. 11 C. W. N. 541.
6. (1911) 22 M. L. J. 364.
7. (1910) 13 I. C. 141.
8. (1913) 25 M. L. J. 433.

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I would hold that not only was the order of remand and reversal unsustainable even on the learned District Judge's view of the law, but that that view of the law is itself unsustainable. The order of the District Judge should therefore be set aside and the District Munsif's decree restored with costs in this and in the Lower Appellate Court. The 2nd defendant is, however, not personally liable for the decree amount, and the District Munsif's decree will be made clear on that point.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

Tumuluri Venkataramayya and others — *Plaintiffs* Appellants.*

v.

Madhaburi Lakshmi Narasimhacharlu — *Defendant. Respondent.*

Damages—Vakil accepting engagement for one party—Agreeing not to appear for the opposite party—Subsequent acceptance from the opposite party—Breach of Contract—Amount of damages.

Venkataramayya v Lakshmi Narasimhacharlu

Plaintiffs 1—7 describing themselves as ryots of an agraharam retained defendant a pleader to appear for them in certain suits which they expected the Agraharamdar to bring against them. The defendant settled his fees and accepted a portion. He also agreed to appear for a similar fee in suits which may be brought against other ryots of the agraharam in a batch along or simultaneously with suits againt themselves. Contrary to the engagement the defendant accepted an engagement from the Agraharamdar in suits filed by him against plaintiffs 8—9 some other ryots of the village. The defendant was also paid some money by the plaintiffs to obtain an opinion. He obtained the opinion and kept it with himself.

Held that the intention was that defendant would appear for the ryots against the Agraharamdar in all suits between them; that defendant in accepting engagement from the agraharamdar in suits against plaintiffs 8 & 9 disabled himself from performing his contract and was liable in damages for breach of the contract.

That he was bound also to return the amount of the fee paid for the opinion which he had obtained but failed to deliver to the plaintiffs.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Masulipatam in A. S. No. 621 of 1911, preferred against the decree of the Court of the Additional District Munsiff of Masulipatam in O. S. No. 371 of 1909.

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*S. A. No. 2278 of 1912 — 14th November 1913

Venkataramayya v. Lakshma Narasimhacharlu

T. Prakasam for Appellant.

V. Ramesam and *K. Bashyam Iyengar* for Respondent.

The Court delivered the following.

Judgment:—The defendant, a pleader, was retained by Plaintiffs Nos. 1 to 7 who describe themselves "as ryots of Ventur Agraharam" to appear for them in certain suits which they expected would be brought against them by the agraharamdars and not to accept vakalat from the latter. He received Rs. 500 from them and was entitled to get Rs. 2,000 under the agreement. The agreement between the parties, which was in writing, also provided that the same fee was to be paid to him in other suits which may be brought by the agraharamdar against other ryots "in a batch along or simultaneously" with suits against themselves. It was clearly intended that he was to appear for all the ryots against the landlords in all the suits in which the questions for decision are admitted to be the same. It was urged for the pleader that the agreement provides that he should appear only in these suits against other ryots which may be brought along with the suits against the seven plaintiffs. This may strictly be so, and it may be that, if suits were brought against the others before or after the suits against these plaintiffs, the agreement does not bind him to appear for them. But there can be no doubt looking to the terms of the document, that the parties intended that the defendant should undertake to do all he can for the ryots in the Court of First instance and the appellate courts and was not to appear for the agraharamdar against any of the ryots. The Defendant afterwards filed suits on behalf of the agraharamdar against Plaintiffs Nos. 8 and 9, other ryots of the village; the question in issue between them being the same as between the plaintiffs and the agraharamdar. We are clearly of opinion that the defendant has thereby disabled himself from performing his part of the contract and he has broken it. He was not in a position to do all in his power for the plaintiffs as he had promised to do. The Plaintiffs are therefore entitled to set aside the contract and claim damages.

As to the amount of damages, the plaintiffs are entitled to recover all that they have paid under the contract. The Rs. 500 paid to the defendant has been decreed to them by the Lower Courts. They claim here in addition Rs. 260. This amount was paid by the plaintiffs to the Defendant to get lawyer's opinion from Madras. It is true he got that opinion. But he kept it himself and without giving it to the plaintiffs he accepted a Vakalat from the Agra-

Venkataramayya v. Lakshmi Narasimhacharlu

haramdar. This is inexcusable. The plaintiffs have not only derived no benefit from their payment, but it may be that their opponent profited by it. Under these circumstances, we do not see why they should not recover this amount also. It was urged upon us that the plaintiffs Nos. 8 and 9 have no cause of action. The question whether the agreement was entered into on behalf of all the villagers has not been decided by the Lower Appellate Court, but, as the Defendant is not prejudiced, we see no reason to call for a finding on that question.

We dismiss the memorandum of objections with costs. We allow the appeal to the extent of Rs. 260. The plaintiffs will receive proportionate costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Karuppan Ambalagaram (died) and others — *Appellants** (*Plff. and his L. Rs.*)

v.

Mahammad Sakuth Levvai — *Respondent* (*Defendant*).

Subrogation—Nominal sale—Purchaser not in possession—Paying off mortgage decree—Not entitled to—Principles on which subrogation to be allowed.

Karuppan Ambalagaram v. Sakuth Levvai

Where a transferee under a nominal sale effected with a view to defraud creditors, not in possession, paid off a decree on a mortgage of the property, *Held* that he was not entitled to be subrogated to the rights of the mortgagee as against a purchaser in execution of a decree against the transferor.

Per *Tyabji* J. Principles on which subrogation is to be allowed, discussed.

Second appeal from the decree of the Court of the Subordinate Judge at Negapatam in Appeal Suit No. 18 of 1910 preferred against the decree of the Court of the District Munsif of Negapatam in Original Suit No. 380 of 1908.

C. S. Venkatachariar for appellants.

K. S. Ganapathi Aiyar for respondent.

The Court delivered the following

Judgments:—*Ayling J.*—The vakil for the appellants has not attempted to support the sale deed, Exhibit A, before us; but has

*S. A. No. 678 of 1911. 14th October 1913.

Karuppan Ambalagaram v. Sakuth Levvai — Ayling J.

confined himself to arguing that the Subordinate Judge was wrong in refusing to allow his client a charge on the property to the extent of the money paid by him in satisfaction of the decree in O. S. No. 56 of 1906 which was brought on a mortgage executed by the owner of land, (the appellant's brother) in favour of one Raman Ambalagaram prior to Exhibit A.

The Subordinate Judge rejected this claim on two grounds:—

(1) that the prayer for a charge is not maintainable in this suit brought primarily to enforce the sale under Exhibit A;

(2) that the plaintiff being a mere "volunteer" cannot claim to be subrogated.

As regards the first, the Subordinate Judge depends on *Kuttichettiar* v. *Subramania Chettiar*[1]. In the present case the plaintiff has in his plaint sued in the alternative for a declaration of his charge, and has taken an issue on it in the original court, while no objection was raised on the ground of misjoinder of causes of action. In such circumstances the ruling quoted appears inapplicable.

The second point requires fuller consideration. The principles on which the right of subrogation should be applied have been discussed at length by a Bench of the Calcutta High Court in *Gurdeo Singh* v. *Chandrekat Singh* and *Chandrekat Singh* v. *Rash Behary Singh*[2] and I cannot do better than quote the remarks of *Mookerjee* J. who has thus tersely summarised the matter.

"The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own."

In the present case there was no assignment or agreement and the only question is whether, in view of the facts of the case, the appellant can be deemed to have been under any legal obligation to discharge the decree in O. S. No. 56 of 1906, or whether he was obliged to do so for the preservation of any right of his own.

The facts are briefly these: On the 19th September 1900 the owner of the property, Raman Ambalagaram sold it to the plaintiff, who was his brother, under Exhibit A for a nominal consideration of Rs. 400. Of this Rs. 41-8-0 is recited as paid in cash the balance

1. (1909) I. L. R. 32 M. 485. 2. (1907) I. L. R. 36 C. 193.

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Ayling J.

was represented by the debts due by the vendor under a promissory-note and two hypothecation deeds which the vendee was to discharge. The Subordinate Judge has found this sale to be collusive and voidable at the instance of the defendant. Possession did not pass under it and not a pie of consideration was paid under it at the time till seven years later. So far as appears, it was a purely nominal transaction.

On the 16th December 1900 the plaint lands were attached by the defendant in execution of a decree against Raman Ambalagaram but they were not brought to sale till the 28th February 1908 when they were purchased by the defendant himself, the sale being confirmed on the 30th March 1908.

Meantime the mortgagees under one of the hypothecation deeds referred to in Exhibit A filed a suit (O. S. No. 56 of 1906 on the file of the Negapatam District Munsif) for the recovery of the amount due on the deed; and the plaintiff was impleaded as a subsequent purchaser of the hypotheca. The result was a decree (Exhibit VI) dated the 19th March 1907. This directs the defendants in the suit to pay the plaintiffs in the same the amount due under the suit hypothecation bond with interest and costs, failing which the hypotheca were to be brought to sale in the usual way. It was represented to us that this decree makes the present appellant personally liable for the amount due under the hypothecation deed but a careful consideration of the document has convinced me that this is not the case. The decree is not drawn up in the form given in the schedule to the present Code of Civil Procedure. But I feel no doubt that it was intended and understood as simply a decree for the realisation of the mortgage amount by sale of the hypotheca. It is specifically recited that the present appellant was impleaded only as a subsequent purchaser and it is obvious that, as such, he could not possibly have been held personally liable for the mortgage amount.

Subsequently, as appears from Exhibits E and F, the decree-holders took steps to bring the property to sale. The sale was however stopped on payment of Rs. 100 by the appellant on the 19th April 1907. The appellant made a subsequent payment of Rs. 50 and the decree was finally satisfied by a payment by the appellant of Rs. 205 on the 13th March 1908. This latter date, it may be remarked, is 14 days after the Court sale to the defendant, and 17 days before its confirmation. It is in respect of these payments that the plaintiff claims subrogation.

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Ayling J.

After careful consideration I think the Subordinate Judge was right in disallowing it. The plaintiff was neither under a legal obligation to make the payments nor had he any right of his own which it was necessary for him to protect. It cannot be held that he enjoyed any interest in the property by reason of the nominal and collusive sale deed, Exhibit A, executed 7 years before which had never been given effect to, and for which no consideration had ever passed.

The appellant's Vakil has relied on two cases *Syamalarayudu* v. *Subbarayadu*[1] and *Palamalai Mudaliar* v. *The South Indian Export Company*[2] as being cases similar to the present in which subrogation was allowed. But a perusal of the judgments in these cases shows that in each the person claiming subrogation was at the time of making payment a transferee of the property for valuable consideration. He may have been guilty of fraud or misconduct in connection with the transfer which might render it voidable at the instance of another party; but he had paid consideration for the transfer and was possessed, at the time he discharged the mortgage, of a substantial interest on the property. The payments for which subrogation was claimed were necessary to protect that interest. This, as it seems to me, is a very real distinction between those cases and the present one.

I consider that the Subordinate Judge's decision was right, and would dismiss the appeal with costs.

Tyabji, J.—The defendant is in possession of property purchased, in Court sale. The plaintiff claimed possession of the same property which he said had been sold to him prior to the Court sale on which the defendant relies. Alternatively, the plaintiff claimed a lien on the property for the monies paid out by him (on the basis of his having been the valid purchaser of the property) in order to discharge a mortgage then subsisting on it. I agree that the case of *Kutti Chettiar* v. *Subramania Chettiar*[3] is distinguishable on the ground referred to by my learned brother. It has been found that the alleged purchase by the plaintiff was inoperative. The only question therefore is whether the plaintiff is entitled to a lien on the property for the sums so paid by him.

The alleged sale to the plaintiff was by Exhibit A, executed on the 19th September 1900. The consideration for that sale purported to be Rs. 400 made up of four items one of which was the payment off of the mortgage to which I have alluded and under

1. (1897) I. L. R. 21 M. 143.
2. (1909) I. L. R. 33 M. 334.
3. (1909) I. L. R. 32 M. 485.

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which Rs. 190 were stated to be due on the property from the ostensible vendor of the plaintiff. It has been found that the plaintiff paid no portion of the consideration for the alleged sale at the time when Exhibit A was executed. In 1906, however, the mortgagee, instituted suit against the plaintiff and his ostensible vendor on the basis of the mortgage. A decree was then passed for the sums due on the mortgage, and the plaintiff who was the 2nd defendant in that suit discharged the mortgage claim by paying Rs. 355 which included Rs. 190 for the principal mortgage debt, about Rs. 45 for costs and the rest for interest on the said Rs. 190. I agree with my learned brother that on the true construction of the decree, the plaintiff was not bound personally to pay the amount of the decree but in the view, that I take of this case, that question is not of much importance and it may be assumed that the construction suggested by the plaintiff is correct and that the plaintiff permitted a decree against himself personally.

It is argued on behalf of the plaintiff that he is entitled to a charge on the property for the said sum of Rs. 355 by operation of the doctrine of subrogation, or by operation of the principle laid down in, or forming the basis of, section 70 of the Contract Act. Hence, the question may shortly be stated to be whether under the circumstances of this case a nominal and collusive transferee without consideration, who being sued jointly with his ostensible transferor by a person holding a mortgage in the property, pays off the mortgage debt in satisfaction of the decree passed in favour of the mortgage, is entitled as against a subsequent purchaser for value to have a lien on the mortgaged property for the sum which he has so paid off.

It is necessary, in the first instance to point out that the plaintiff here claims to fix a charge on the property and his claim is not merely personal as against those with whom he had dealings. Ss. 69 and 70 of the Contract Act do not refer to any charge or lien upon any property, and seem to contemplate at least primarily only a personal liability. No legislative provision contained in any Act was cited to us directly covering the point, but there are decisions of this Court which seem to recognise the right of subrogation in the wider sense in which it is understood in the Courts of the United States. Some decisions of those Courts are referred to by *Mookerji*, J. in *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rash Behary Singh*[1]. It seems desirable to refer to the exposition of the law of subrogation based on those decisions owing

1. (1907) I. L. R. 36 Cal. 193, at page 217.

to the absence of any statutory definition of the right, and inasmuch as the English authorities seem to contemplate mainly one form of subrogation; *viz.*, the substitution of the insurer to the rights of the assured [see Smith's Mercantile Law, 10th Edition, pages 502, 503 and Encyclopædia of Laws of England (*Sub verb*).] Though subrogation was a creation of the Civil Law, it seems never to have been recognised to its full extent by the Common Law. See the Cyclopædia of (American) Law and Procedure, Vol. 37, p. 365 citing (*Curante* v. *Eannaco*)[1].

Subrogation in its wider signification has been defined "as a substitution, ordinarily the substitution of another person in the place of one creditor, so that the person in whose favour it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another, whether as creditor, or as the possessor of any other rightful claim. The substitute is put in all respects in the place of the party to whose rights he is subrogated." (See the Cyclopœdia of (American) Law and Procedure, Vol. 37, pp. 363, 364 citing *Townsend* v. *Cleveland Fire Proofing Co.*)[2] The right so defined "does not necessarily rest on Contract or Privity, upon principles of natural equity, and does not depend upon the act of the creditor, but may be independent of him and also of the debtor." It is, however, a purely equitable right, and "there must, in every case where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some principle of equity jurisprudence as recognised and enforced by Courts of equity. Where the rights of subrogation exists it is subject to prior equities and all the rules of equity."

It has been pointed out that one mode in which the question may be considered where the right of subrogation may be claimed, is to determine whether the person claiming it is a mere volunteer or stranger : for if so then the right cannot—at least in the great majority of cases—be claimed. As I understand the law, the rule is merely a test for the application of the general principles stated above—being one aspect of the wider question whether subrogation can be claimed in the particular circumstances of the case—of principles of justice, equity and good conscience. That test may not be in some cases be conclusive, not the most convenient, or direct method of arriving at a decision. It may be that a person cannot be described as a stranger, and yet he may not be entitled to the right. There

1. 65 N. Y. App. Div. 435 ; 72 N. Y. Supp. 1048.
2. 18 Ind. App. 568 ; 47. N. E. 707, 709

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may be other cases (though they would be rare) where the right is given to a person who can be taken out of the category of a volunteer, if at all only by subtleties and fictions. Hence the determination of the question whether or not the person claiming subrogation is a stranger may often be a circuitous and uncertain means for arriving at a decision on the real point.

In deciding whether in any particular case it would be equitable to allow the right of subrogation, regard should in my opinion, be had to Ss. 68 to 72 of the Indian Contract Act, which illustrate how relations resembling those created by contract may arise: subrogation (when it does not arise out of contract) creates such a relation. Regard should also be had to the recognised principles by which Courts of Equity are guided: one of such principles material to the present case is that the party seeking the assistance of the court must come before it with clean hands.

The application of this general statement of the law to the facts of the present case will be best considered in connection with the decided cases in which the right of subrogation in the wider sense has been recognised.

Much reliance was placed on the case of *Syamalarayudu* v. *Subbarayudu*[1]. There the owner of the property entered into two separate agreements to sell the property at different times with two persons. The later agreement was ante-dated by an illegal act of the plaintiff so as to make it appear that his rights had priority. It is argued that this case shows that a valid charge may be made upon property even by reason of payments made by a person who has been guilty of an illegal act for the purpose of depriving another of his right to purchase that property; and that, therefore, payments made in satisfaction of a decree passed against a person who has taken a transfer of the property in his name (though without consideration) and who is subsequenty sued on the basis of his being the transferee of the property, have a greater claim to be considered as a charge upon the property after it is transferred to another purchaser. It seems to me, however, that one distinction between the case reported in *Syamalarayudu* v. *Subbarayudu*[1] and the present case is overlooked in this argument. In that case the liability of the rightful purchaser to pay the mortgage was established in the very suit in which the sale to him was upheld. When the rightful purchaser's rights in the property accrued, the property was still subject to the mortgage, which was

1. (1897) I. L. R. 21 M. p. 143

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discharged by the nominal purchaser, though it is true that the object for so discharging the mortgage was to strengthen the colourable purchase. On the other hand, in the case with which we have now to deal, the person who is sought to be charged with the mortgage debt was not a party to the suit on the mortgage and he has had no opportunity of contesting its validity or effect. Again here the payment off of the mortgage debt, which was made long after the ostensible sale, was, in fact, a portion of the consideration for the sale. In the reported case the liability had been discharged apart from (though in one sense as a sequel of) the transaction vitiated by fraud, and it was explicitly held that the act of discharging the existing liability on the property, under the mortgage was an Act lawful in itself and that it did not form part of the fraud. Here a liability was purported to be taken upon himself by a person for the purpose of defrauding creditors, and it was only by discharging, or appearing to discharge that liability so taken upon himself that effect was given to the fraud: this is the only payment made for giving colour to the nominal sale which has been found to be fraudulent. Where an act is in itself lawful and is quite distinct from the original fraudulent transaction, it may stand on a better footing than an act which forms part of the fraud: though the validity of acts of the former class may be impaired when their connection with the fraud is so close as to make them indistinguishable from those acts which form integral portions of the fraud, the question being one of degree.

Finally, in *Syamalarayudu's case* the purchaser had agreed to purchase subject to the mortgage, and he was not charged with a liability which he had not contracted to meet the result of subrogation in that case was that a liability which had existed between the rightful purchaser and the vendor was merely transferred in favour of a third party: and such transfer did not put the rightful purchaser in any worse position than when he had contracted to purchase.

The next case on which reliance was placed was *Palamalai Mudaliar* v. *The South Indian Export Company Limited*[1]. In that case also prior to the transfer in question there was a valid mortgage decree subsisting on the property (not a personal decree againt the parties), and the sale, though it was held to be voidable at the instance of creditors, was not a mere nominal transaction without consideration but the transferee had satisfied that decree so as to make the satisfaction enure to the benefit of the mortgagor and of his creditors.

1. (1909) I. L. R. 33 M. 334

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The Court held (not without some debt) that the sale was voidable at the instance of the creditors inasmuch as it had the effect of defeating or delaying them, it followed therefore almost as a corollary that in so far as the sale had not delayed or defeated the creditors, but was actually for their benefit should be upheld.

Another head of argument on behalf of the appellant was that but for the payment off of the mortgage by the plaintiff, the defendant would have been liable to pay it off, that the defendant must be taken to have purchased the property subject to the mortgage, and that the plaintiff was entitled to claim from him the sum in respect of the liability for which the defendant was relieved by the acts of the plaintiff. But that does not seem to me to represent the true state of facts. The real question for us is whether, when the defendant purchased the property, there was any charge, subsisting in favour of the plaintiff or any one else against the property. In considering the question, it is clear that the case of both parties was that the original mortgage had been discharged and the property was held discharged from the mortgage; the plaintiff claimed to hold the property so discharged himself, and the defendant claimed that it was held by his judgment-debtor. It may be that in the Court sale in which the defendant purchased, the property the biddings were lower than they would have been, had there not been these doubts whether the property did or did not belong to the plaintiff. But there was no question that the mortgage had been discharged. It has been now held that it did not belong to the plaintiff. The fact that the value of the property was depreciated by a fraudulent transaction to which the plaintiff was a party, seems to me to be no reason for assisting the plaintiff as against an innocent third party.

Considering the facts of this case broadly, it seems to me that as between the plaintiff and the defendant it would not be equitable to permit the plaintiff to have the discharge that he claims and that to do so would be going beyond any decision to which our attention had been drawn.

I agree, therefore, that the appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar, and Mr. Justice Spencer.

T. Varadiah — *Appellant.* Petitioner.*

v.

Raja Kumara Venkata Perumal Raja Bahadur Varu — *(Respondent. Counter Petitioner.)*

Mortgage decree—Right to abandon claim against mortgaged property in execution—Dependent on construction of decree—Not entitled where decree directs property to be exhausted before resorting to other remedies—Limitation Act, art. 182—Step-in-aid of execution—Prayer for bringing in legal representatives of Judgment-debtor—Errors in the matter of reliefs—Effect of—Res judicata in execution—Essentials of—C. P. C. S. 48—Amendment to save bar of—Substitution of prayer for sale of mortgaged properties for prayer for attachment of other properties.

Whether it is competent to the mortgagee after decree to abandon his claim against the mortgaged property and proceed against the person or other property of the mortgagor depends entirely upon the construction of the decree *Kamti Ramaji Chidivialla Ramamurthi Pantulu Garu*[1], followed. Varadiah v. Raja Kumara Venkata Perumal

Where, accordingly, the decree directed the sale of the mortgaged property and for the balance gave the decree holder right to proceed against the mortgagor personally.

Held that it was not competent for the decree-holder to proceed against the other property of the mortgagor before selling the mortgaged property,

In the circumstances of the case, to avoid the bar of S 48 C.P.C. their Lordships permitted the decreeholder to amend his application for execution by substituting the mortgaged properties for properties sought to be attached.

An application for execution containing a prayer to bring in the legal representatives of the judgment-debtor is a step-in-aid of execution sufficient to save limitation though it might contain errors in the matter of reliefs &c. e.g. in that it prayed for attachment of the other properties of the mortgagor before exhausting the mortgaged property.

The principles of *Mahalinga Mooppanar v. Kuppanachariar*[2], *Kamakshi Pillai v. Ramasami Pillai*[3], *Ramien v. Khadir Batcha Sahib*[4], *Appaiyar v. Dharani Moodali*[5], preferred to *Munawar Hussain v. Jam Bijai Shankar*[6].

An order in execution cannot be given the effect of *res judicata* when there is nothing to show that it was passed after notice and after giving the judgment debtors sufficient opportunity to contest it, *Ramasami Naick v. Ramaswami Chetti*[7], followed.

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* C. M. A. 257 of 1909. 11th November 1913.

1. (1907) 3. M. L. T 355
2. (1907) I. L. R. 30 M. 541
3. (1907) 18 M. L. J. 14
4. (1906) I. L. R. 31 M. 68
5. (1907) 17 M. L. J. 475
6. (1907) I. L. R. 27 A. 619
7. (1906) I. L. R. 30 M. 255 at 263.

Varadiah v. Raja Kumara Venkata Perumal

Appeal from the order of the District Court of North Arcot in E. P. No. 3 of 1909 in O. S. No. 24 of 1896.

C. V. Ananthakrishna Aiyar for appellant.

A. Ramachendra Aiyar for Respondent.

The court delivered the following

Judgment:—The learned District Judge has dismissed the execution application No. 3 of 1909, on the grounds (*a*) that it was barred by limitation because the prior application No. 11 of 1906, was not an application for execution in accordance with law, because this prior application wrongly prayed for attachment of non-mortgaged properties before the mortgaged properties were brought to sale and (*b*) that this same prayer repeated in the present petition, No. 3 of 1909, cannot be legally granted as the decree obliges the decree-holder to bring the mortgaged properties to sale in the first instance and allows him to proceed against the other properties only for the balance of the decree amount (if any).

As regards the 2nd ground the appellant's (decree-holder's) learned Vakil relied on certain Allahabad cases (especially *Pirbhu Narain Singh* v. *Amir Singh*)[1], for his contention that the mortgagee and decree holder was entitled to abandon his claim under the decree to bring the mortgaged properties to sale and on such abandonment to apply for execution in the first instance against the other properties. Even if *Pirbhu Narain Singh* v. *Amir Singh*[1], is not distinguishable as relating to an application under S. 90 of the Transfer of Property Act we think we are bound by the decision in *Kamti Ramaji* v. *Chidivialla Ramamurthi Pantulu Garu*[2]. In that case the learned Judges (*Miller* and *Munro* JJ.) held that the question in execution proceedings is "what does that decree" (the decree sought to be executed)" direct?" We are of opinion that the decree must be construed as requiring the decree-holder to exhaust his remedy against the mortgaged property before he can commence proceedings against the 1st Defendant or the other property referred to. The decree cannot be construed as giving the decree-holder the right of abandoning his claim against the mortgaged property to create a necessity to proceed against other property. The case in *Damodar* v. *Vyanker*[3], also prohibits attachment of other properties till the mortgaged properties are sold as directed by the decree.

But we think that this is a fit case where we should allow the petitioner to amend his application by praying for sale of the

1. (1907) I. L. R. 29 A. 369. 2. (1907) 3 M. L. T. 365
3. (1906) I. L. R. 31 B. 244.

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mortgaged properties in execution as there is nothing to show that he did not believe in good faith that he was entitled to pray for attachment of properties other than the mortgaged properties. The contention of the appellant's learned Vakil that an order passed in 1898 in a prior execution petition allowing him to attach other property is *res judicata* cannot be accepted, as there is nothing to show that that order was passed after notice to the judgment debtors and after giving the latter an opportunity to contest it. (See *Ramasami Naik* v. *Ramasami Chetty*[1]) Hence the petitioner unless he is allowed to amend his application might be barred by the 12 years' rule and we allow him to so amend it in this Court within two weeks of this date.

The Lower Court was, in our opinion in error in having decided that E.P. No. 11 of 06 is not an application in execution in accordance with law or to take a step in aid of such execution. The Petitioner prayed also in that petition for the legal representative of the 1st Defendant to be brought in and even if it contained errors in the matter of the proper reliefs etc., it is sufficient to give a fresh starting point for limitation provided it was itself not barred by limitation.

We think that the principles of the decisions in *Mahalinga Mooppanar* v. *Kuppanachariar*[2], *Kamakshi Pillai* v. *Ramasami Pillai*[3], *Ramayyan* v. *Kadir Bacha Saib*[4], and *Appaiyar* v. *Dharani Mudali*[5], are more binding on us than the case of *Munawar Hussain* v. *Jani Bijai Shanker*[6], quoted by the Respondent's learned Vakil.

In the result we direct that on the appellant's amending in 2 weeks the Execution Petition No. 3 of 1909 by praying for sale of the mortgaged properties, the lower Court's order be set aside and the petition No. 3 of 09 be reheard by the District Court to decide the question whether E. P. No. 11 of 1906 was itself filed beyond the time allowed by law for an execution application and also to pass fresh orders having regard to the above remarks. If the application is not amended the appeal will stand dismissed. In any event the appellant will pay the Respondent's costs in this court.

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1. (1907) I. L. R. 30 M. 255 at 263.
2. (1907) I. L. R. 30 M 541.
3. (1907) 18 M. L J. 14.
4. (1907) I. L. R. 31 M. 68.
5. (1906) 17 M. L J. 476.
6. (1905) I. L. R 27 A. 619.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Ananda Gopal Gossain and others ... *Appellants* *

v

Nafar Chandra Pal Chowdhuri and another... *Respondents.*

Patni—Sale of, for arrears of revenue—Auction purchaser, suit for possession by—Bengal Tenancy Act VIII of 1885—S. 167—Notice of annulment of encumbrances—Service, mode of.

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Where a patnidar committed default in paying the rent to the Zamindar the latter obtained a decree against him and in execution put up the estate for sale by auction subject to a darpatni granted by him. But as no bids approaching the amount due were offered he issued a fresh proclamation for sale with power to avoid all incumbrances under the provisions of the Bengal Tenancy Act of 1885, Sec. 165. The estate was purchased by the respondents. They gave notice through the Collector of the district to avoid the darpatni under Sec. 167. The darpatnidar took no heed of the aforesaid notice ostensibly on the ground that it was not served as required by the Tenancy Act.

Held that the service of the notice through the Collector was in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure of 1882 and therefore notice was properly served in accordance with the requirements of the Bengal Tenancy Act of 1885, Section 167.

Appeal from a Judgment and decree of the High Court dated August 28, 1907, reversing a decree of the court of the Subordinate Judge of Nadia dated July 31, 1905, and remanding a case for further trial.

The Raja of Nadia granted a patni of certain villages to certain persons through whom the taluk devolved upon certain other persons who made default in payment of the rent due. The Raja obtained a decree against the patnidar who had created dar-patnies and put up the estate for sale. No bids were offered which would have nearly satisfied the amount due. Therefore the Raja issued a fresh proclamation of sale of the aforesaid patni taluk with power to avoid all incumbrances and sub-tenures created by the patnidar under the provisions of the Bengal Tenancy Act 1885, Sec 165.

The respondents in the case bought it and gave notice through the collector to the dar-patnidars for annulling all incumbrances under section 167 of the Bengal Tenancy Act 1885. The notice was

* 20th November 1913.

served in a manner which satisfied the requirements of the Code of Civil Procedure 1882 for the service of a summons on a defendant as well as by proclamation and beat of drum and by posting the notice in conspicuous places in the village before more than two persons. The dar-patnidars took no heed, resisted delivery of possession of the estate to the purchasers and committed various acts of waste thereon.

A suit was brought for ejecting the appellants who defended it on various grounds among which was that the notice was not served in a manner prescribed by the Bengal Tenancy Act. The Subordinate Judge held the service of notice bad, but the High Court held it good and remanded the case for further trial on other issues which he had left untried thinking they were not material to the case when the service of notice was not good. The appellants then applied to the High Court for leave to appeal to His Majesty in Council. The High Court thought that the question as to whether the notice was properly served or not was the cardinal point in the case and granted leave to appeal to the Judical Committee.

Ross K. C. & O'Gorman for appellants contended that the service of notice as required by the Bengal Tenancy Act of 1885 Sec. 167, was not effected nor were the provisions of the Government rule as published under that Act satisfied. There were some defendants who were women on whom admittedly no notice was served. The remanding of the case for further trial on some issues only was not correct.

Loundes for respondents contended that the service of notice was, in any event, effected in the manner prescribed by section 80 of the Code of Civil Procedure of 1882. [He was stopped from further arguing the point and *Ross* K. C. & *O'Gorman* asked to reply].

Ross K.C. replied.

The Judgment of their Lordships was delivered by

Sir John Edge:—This is an Appeal from a decree of the High Court of Judicature at Calcutta, dated the 28th of August 1907, which set aside a decree of the Subordinate Judge of Nadia, dated the 31st of July 1905, and by which the suit was remanded to the Court of the Subordinate Judge for trial of issues which had not been disposed of by him.

The suit was brought to obtain Khas possession of Mouzahs which were comprised in a putni taluk which had been purchased

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by the Plaintiffs at an auction sale under a decree for rent which had been obtained by the Maharaja of Nadia. The Plaintiffs also claimed mesne profits and other reliefs. The Defendants raised various defences, to two of which only is it necessary to refer for the purposes of this Appeal. One of the defences was that certain notices which should have been served under section 167 of the Bengal Tenancy Act VIII of 1885, had not been served. The other of these defences was that the suit could not be maintained by reason of the non-joinder of one Nitharmoni Debi as a defendant.

The Subordinate Judge of Nadia found that service of the notices under section 167 of the Bengal Tenancy Act, 1885, had not been proved, and further, that the suit was bad by reason of the non-joinder as a Defendant of Nitharmoni Debi, and dismissed the suit with costs. From the decree of the Subordinate Judge the Plaintiffs appealed to the High Court.

On the Appeal the High Court not being satisfied that there was in any of the villages in question an office where the rent was usually paid, and finding that the notices had been served by proclamation and beat of drum, and by posting them on trees in the villages, held that the notices required by Section 167 of the Bengal Tenancy Act, 1885, had been duly served in one of the manners prescribed for service of such notices by Government Rules then in force.

In the Court of the Subordinate Judge it had apparently been contended that the notices had been served in the manner prescribed for the service of a summons on a Defendant under the Code of Civil Procedure, 1882, and also by proclamation and beat of drum and by posting them, on some conspicuous place in the village. Under the circumstances of this case either manner of service would have been sufficient. In the view of the evidence which their Lordships take, it is not necessary to express an opinion as to whether there had or had not been effective service by proclamation and beat of drum, and by posting the notices as required by the Government Rules relating to the service of such notices. Their Lordships find on the evidence which was brought to their attention that the notices were served in the manner prescribed for the service of a summons on a Defendant under the Code of Civil Procedure, 1882, which was the Code of Civil Procedure which was in force at the time when the notices were served.

On the Appeal to the High Court the only defect in the framing of the suit which was alleged by the Defendants, who were Respondents to that Appeal, was that Nitharmoni Debi had not been

made a Defendant. On the application of the Plaintiffs, who were Appellants in the High Court, the High Court ordered that Nitharmoni Debi should then be made a Defendant, and she was accordingly added as a Defendant. She has not appealed against the decree of the High Court, and it is not necessary for their Lordships to express any opinion as to her position in this litigation. It was not seriously contended before this Board, indeed it could not have been argued successfully, that the omission to make Nitharmoni Debi an original Defendant made the suit bad for non-joinder as against the other Defendants who are the Appellants here. Nor could it have been successfully argued that the order of remand was bad in law, so far as these Defendants are concerned, by reason of the fact that Nitharmoni Debi was added as a Defendant by the High Court when the suit was in appeal before the High Court. Nitharmoni Debi was not at any time a necessary party to the suit so far as these Defendants—Appellants are concerned, nor have they been prejudiced by the fact that she was added as a Defendant when the suit was in Appeal.

This Appeal fails and their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellants must pay the costs of the Appeal.

Solicitors for appellants :—*G. T. B. S. Turnell.*

Solicitors for respondents :—*W. W. Box & Co.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court at Fort William.]

Present:—Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Raja Thakur Barmah and others *Appellants.**

v.

Jiban Ram Marwari and others *Respondents.*

Execution sale—Misdescription—Identity—Difference between—Attachment—Power to sell confined to property attached—Property described as subject to mortgage—Sale of—Substitution of property not subject to mortgage—Ultra vires—Mistake—Nature of documents relevant, to affect auction purchaser—Remedy of decree holder when wrong property attached and sold.

In execution of a decree, application was made for the attachment and sale of certain property which was described in the schedule. The property was attached and sale ordered as prayed for. The property was described in the schedule as a 6 annas share in certain property mortgaged to one A. R. At the

*25th November 1913.

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time the whole property was owned by the judgment-debtors of which 10 annas was under mortgage to A. R. and 6 annas was not. In the sale that took place, respondents became the purchasers and applied for sale certificate. When so applying, they alleged that a mistake had been made in the schedule of the property to be sold in that the word "not" had been omitted from the description of the 6 annas in question and that the property should have been described as being 6 annas not mortgaged under the bond of A. R. The court granted them certificate in the form they desired.

Held: The effect of the court's order was to make the sale that of a property not attached. As the court could only sell property which is attached, the order was beyond its powers.

That which is sold in a judicial sale can be nothing but the property which is attached and that property is conclusively described in and by the schedule to which the attachment refers.

A property fully identified in the schedule may be in some respect misdescribed. Such misdescription may be disregarded as mere irregularity. But where existing property is accurately described in the schedule it is no longer a case of misdescription but one of identity.

Want of correspondence between the advertisement in the Calcutta Gazette and the description in the schedule (the former describing the shares as unencumbered) was an irregularity which would require the assistance of the court to cure it if the sale were regular in other respects but it cannot validate the sale of property to which the attachment did not relate.

If, by mistake the wrong property is attached and ordered to be sold, the only course open to the decreeholders on the discovery of the mistake is to commence proceedings against. They could not turn authority to sell one property into authority to sell another.

The only relevant documents to show mistake which can affect the purchaser are documents of which knowledge can be attributed to the public to whom the property is offered for sale.

In the result, their Lordships set aside the order confirming the sale together with the certificate granted under it.

Appeal from a Judgment and decree of the High Court dated June 26, 1906 affirming an order of the Court of Subordinate Judge of Godda dated December 20, 1904.

The facts of the case are sufficiently set forth in their Lordships' Judgment.

Dunne for the appellants contended that the Court of the Subordinate Judge had no jurisdiction to make the order substituting one property for the other in a judicial sale. The order was further bad as it was made in haste. The actual property sold was the equity of redemption and rest another unencumbered passages. The sale certificate granted should have conformed in its terms to the description of the property attached and sold.

De Gruyther and *Eddis* for the respondents contended that there by no appeal against the order of the Subordinate judge and

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that the High Court was right in holding that there were no grounds for interfering by way of revision. The Judgment-debtor's remedy was by application to set aside the sale under S. 311 of the Code of Civil Procedure. The judgment debtors had not been shown to have suffered any substantial injury. It was clearly understood by all the parties concerned that it was the unmortgaged portion of the property which was being sold.

Dunne replied.

The Judgment of their Lordships was delivered by

Lord Moulton :—This is an Appeal against a Judgment and Decree of the High Court of Judicature at Fort William in Bengal, dated 26th June 1906, affirming an Order of the Court of the Subordinate Judge of Godda in the Sonthal Pergunnahs, dated 20th December 1904, granting a certain sale certificate to the second set of Respondents hereto, described as auction-purchasers. The facts of the case so far as is necessary for the decision of this Appeal are as follows :—

On the 23rd October 1903 the Respondents Jiban Ram Marwari and Ishwar Das Marwari (described as the decree holders), obtained judgment against the original Appellant Rajah Thakur Barmah (now represented by his heirs and legal representatives), for a sum of 42,562 rupees and interest, and on the 31st October 1903 the decree holders applied for execution of the decree by attaching and selling the property mentioned in the application. It is only material to refer to the first item in the Schedule specifying that property which reads as follows :—

"The Defendant's Zamindari and Milkiat right in the six annas out of "16 annas of Mahal Tappa Patsanda bearing towzi No. 462 and sudder-jumma "of Rs. 2,402-9-0 (for the 16 annas) payable in Dumka Collectorate. This property is mortgaged in the bond of Babu Anant Ram Marwari and others "decree holders inhabitants of Bazar Shujaganj in the Town of Bhagalpur and "also a two annas share of the said Mahal, which has been hypothecated as security on behalf of the Defendant in the case of execution of a mortgage "decree of the said Babu Anant Ram Marwari and others, decree holders, "against the judgment debtor, in the First Court of the Subordinate Judge "of Bhagalpur, in all, eight annas share of the said Mahal together with all "rights and interests of the judgment debtor and the Kamat land, *nami* and "*benami* jalkar, phalkar, bankar &c, and Kachari House appertaining to the "Estate. The estimated value is Rs. 60,000."

In the ordinary course an order was made for the sale of the attached property mentioned in the above schedule by public auction, and proclamation of the sale was made in the required manner. The sale commenced on the 16th June 1904, but for a long time

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the bids were insufficient and the sale was not finally concluded until the 28th day of July 1904.

On the 20th day of December 1904 an application was made on behalf of the auction purchasers to obtain a sale certificate for the six annas share of Tappa Patanda purchased by them at the auction sale. In making this application they alleged that a mistake had been made in the schedule of the property to be sold in that the word "not" had been omitted from the description of the six annas in question and that the property should have been described as being six annas not mortgaged under the bond of Babu Anant Ram Marwari. At that date 10 annas of the property were so mortgaged while the remaining six annas were free from any mortgage. They claimed that their certificate should be made out as being a certificate of the purchase by them of the six unencumbered annas instead of (as described in the schedule) six annas subject to the existing mortgage. The Subordinate Judge granted them a certificate in the form which they desired and the High Court sustained his order. It is from this order that the present appeal is brought.

Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers. In the present case that property was six annas subject to an existing mortgage. The effect of the certificate of sale granted by the Order of the Subordinate Judge is to make the sale that of a property not attached, namely the six unencumbered annas,—a property which could not be sold in such proceedings in as much as it was not the property attached.

An attempt was made to treat the matter as a case of misdescription, which could be treated as a mere irregularity. But in this case we have to deal with identity and not description. A property fully identified in the schedule may be in some respects misdescribed but that is not the present case. Here we find an existing property accurately described in the schedule and the order of the Subordinate Judge grants a sale certificate which states that another and a different property has been purchased at the judicial sale. It was beyond the powers of the Court to make such an order, inasmuch as there was no power to sell in these judicial proceedings the property thus certified to have been purchased.

Counsel for the Respondents sought to support his case by referring to documents in their judicial proceedings tending to sup-

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port the view that a mistake had been made in drawing up the schedule, and that the property intended to be inserted therein was the unencumbered 6 annas. Their Lordships are of opinion that all such matters are irrelevant. If by a mistake the wrong property was attached and an order made to sell it, the only course open to the decree holders on the discovery of the mistake was to commence the proceedings over again. They could not turn an authority to sell one property into an authority to sell another and a different one. Moreover it is impossible to attribute to the public to whom the attached property is offered for sale a knowledge of proceedings in other suits which might have led them to suspect that an error had been made. The only relevant document brought to their Lordships' notice in this respect was an advertisement in the "Calcutta Gazette" which though purporting to be a description of the attached property, differed from the description in the schedule by representing that the property to be sold was free from the mortgage. This want of correspondence between the advertisement in the "Calcutta Gazette" and the schedule of the attached property in the proclamation of sale constitutes an additional irregularity which it might need the assistance of the Court to cure if the sale were regular in other respects, but it cannot validate a sale of property which was not the property to which the attachment related.

Their Lordships therefore will humbly advise His Majesty that this Appeal should be allowed, and that the Order of the Subordinate Judge confirming the sale together with the certificate granted thereunder dated the 20th December 1904 should be set aside. This will of course have the effect of setting aside all subsequent proceedings on the part of the auction purchasers based thereon.

The Respondents will pay the costs of the application to the Subordinate Judge of the 20th December 1904 and of the Appeal to the High Court of Judicature at Fort William in Bengal, and also the costs of this Appeal.

Solicitors for appellants :—*T. L. Wilson & Co.*

Solicitors for respondents :—*Theodore Bell & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Oldfield.

Subramania Pillai and another — *Plaintiffs (Appellants.)*

v.

Palaniappa Mudali and others — *Defendants (Respondents.)*

Mortgage—Subrogation—Purchaser pendente lite—Earlier mortgages paid off—Ignorance of mortgage sued upon—Right to subrogation notwithstanding—Presumption of keeping alive—According to interest.

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Where a person paying off a mortgage has a right either to keep the mortgage alive or to extinguish it, in the absence of evidence as to intention, he must be assumed to have acted according to his interest.

Accordingly, the plaintiff, a private purchaser whose sale was held invalid against the purchaser in execution of a decree upon a mortgage, having been effected *pendente lite*, was held entitled to be subrogated to the rights of three prior mortgagees who had been discharged out of the purchase money paid by him, though he was unaware of the subsequent mortgage and had not consequently evinced any intention to keep the earlier mortgages alive.

Second appeal from the District Court of Trichinopoly in A.S. No 172 of 1911 preferred against the decree of the Court of the District Munsif of Namakkal in O. S. No. 330 of 1909.

T. Natesa Aiyar for Appellants.

R. Kuppuswami Aiyar for Respondents.

The Court delivered the following

Judgment.—*Ayling J*:—The only question argued in this appeal is whether the District Judge is correct in refusing to allow the plaintiffs the right of subrogation in respect of sums admittedly expended by them in discharge of two mortgage decrees (O. S. Nos. 841 of 1900 and 178 of 1902 on the file of the Court of the District Munsif of Namakkal) enforceable against the suit properties.

The facts are as follows:—The plaintiff's father was the vendee of the suit lands under a sale deed, Exhibit B, dated the 14th December 1904 for Rs. 1500. Of this sum Rs. 870 was represented by the discharge of a mortgage decree held by the plaintiff's father himself against the property. In respect of this, the Judge has allowed the plaintiff's claim. The balance was to be applied; and, admittedly, was in fact applied, in discharge of the two decrees above mentioned, based on mortgages of the said property. Exhibit B was executed during the pendency of a suit (O. S. No. 1092 of

*S. A. No. 1543 of 1912. 18th November 1913.

1904) brought by the 5th defendant, Kali Mudali, on a fourth mortgage; and on this ground, it was held to be invalid against Kali Mudali (vide Exhibit H judgment in O. S. No. 358 of 1906 on the same Munsif's file confirmed in appeal). The present contesting Respondents Nos. 1 to 3, are parties who purchased the property in execution of Kali Mudali's decree.

The plaintiffs' rights as purchasers having thus disappeared, they claim to be subrogated in respect of the prior mortgages on the property discharged by them.

The District Judge has refused to allow their claim on the following ground. He says:—

"The test is, did the plaintiff's father intend to keep alive the prior mortgage? Admittedly he knew nothing of the 5th defendant's mortgage at the time he purchased the properties conveyed to him under Exhibit B, and there seems no reasonable doubt that when he agreed to discharge the three previous mortgages as consideration for his sale-deed, he had no intention of keeping them alive."

The leading case on the point is that of *Gokuldas Gopal Das* v. *Premsukdas*[1] wherein their Lordships of the Privy Council laid down the rule, which has been followed in all later cases, that, where a man who pays off a mortgage has a right to extinguish it and a right to keep it alive, in the absence of express evidence of intention, he should be assumed to have acted *according to his interest.* The present is a case exactly in point The plaintiff's father at the time he discharged the mortgages had the option of extinguishing them or keeping them alive. It cannot be said that there is any express evidence of what his intention actually was. No doubt, at the time of payment he believed himself to have acquired a good title to the equity of redemption. But this was not so. His title was invalid, against Kalimudali, as has been already explained; and for all the good it did him was non-existent. His real interest certainly dictated keeping alive the incumbrances; and this is the intention that should be ascribed to him in pursuance of the rule laid down in the case above quoted. As authority for holding that we must look to the real facts, and not to the facts as the person who paid off the mortgages conceived them to be at the time of payment, we may refer to the judgments of the *Chief Justice* and *Munro* J. in *Mahalakshmi Ammal* v. *Sriman Madhava Siddanthi Marhim Nidhi*[2].

1. (1884) I. L. R. 10 C. 1035. 2. (1911) I. L. R. 35 M. 642.

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Ayling J.

Reliance is placed by the Respondent's Vakil on the cases reported in *Srinivasachari* v. *Gnana Prakasa Mudaliar*[1] and *Govindasami Thevan* v. *Doraisami Pillai*[2]. These cases are simply authority for holding that, where a person who has actually acquired the equity of redemption pays off a prior mortgage, he cannot claim the right of subrogation in respect of that mortgage as against a *puisne* mortgagee. Such a person does not really come within the scope of the Privy Council ruling in Gokuldas's case. Any doubt as to his intention is cleared up by S. 101, Transfer of Property Act. Unless he declares his intention to keep the mortgage alive, it becomes extinguished by the mere fact of discharge.

I would reverse the decree of the District Judge and restore that of the Munsif. The defendants Nos. 6 to 8 should bear the costs of the plaintiffs-appellants in this and the District Court.

Oldfield J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Nayari Venkata Ranga Row Garu *Petitioner.**

v.

Raja Keesara Venkatarama Narasimha Row and others *Respondents.*

Venkata Ranga Row v. Venkatarama Narasimha Row

Civil Procedure Code (Act V of 1908) S. 109—Final order—Order remanding on question as to pleadings or as to bar by S. 43 O. P. C. (old code)—Interlocutory judgment—No appeal to His Majesty in Council.

An order of the High Court, remanding a suit to the District Court for trial on the ground that the District Court was wrong in holding that the pleadings were insufficient or that S. 43 C. P. C. (old code) barred the suit is not a final order and therefore no appeal lies against such order to His Majesty in Council under S. 109 C. P. C. (new code).

Petitions praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to grant leave to appeal to His Majesty in Council against the order dated the 16th December 1909 of the High Court of Judicature at Madras in A. S. Nos. 133 and 134 of 1904 presented against the decrees of the District Court of Kistna at Masulipatam in O. S. Nos. 45 and 56 of 1895 respectively.

T. Rangachariar for petitioner.

K. Srinivasa Aiyangar for respondents.

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* C. M. P. Nos. 283 and 284 of 1910. 18th September 1913.

1. (1906) I. L. R. 30 M. 67.
2. (1910) I. L. R. 34 M. 119.

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The Court made the following.

Order:—We find ourselves unable to give the certificate applied for, for the reason that the orders of this Court are not final orders within the meaning of S. 109 of the Code of Civil Procedure.

In these cases, no question between the parties in regard to their rights, as against one another has been decided. One case has been remanded for trial on the ground that the District Judge was wrong in deciding that the pleadings were insufficient, and the other on the ground that he was wrong in applying S. 43 of the former Code of Civil Procedure in bar of the suit. These are clearly preliminary points having no connection with the merits of the suits. We are invited for the petitioners to hold that the orders of remand are final orders within the meaning of S. 109 of the Civil Procedure Code; but we are unable to accept the invitation. In this Court the only authority cited *Tirunarayana* v. *Gopalasami*[1] is against the petitioners. We have been referred to the decisions of the Privy Council in *Rahimbhoy Habibhoy* v. *C. A. Turner*[2]; *Syed Muzhar Hossein* v. *Mussamat Bodha Bibi*[3]; *Radha Krishna* v. *The Collector of Jaunpur*[4] and *Chandra Kunwar* v. *Chaudhri Narpat Singh*[5]. None of these cases as we understand them, is an authority in favor of the petitioner. In *Rahimbhoy* v. *C. A. Turner*[2] and *Syed Muzhar Hussain* v. *Mussamat Bhoda Bibi*[3] where appeals were held competent on the merits on which the decision of the disputes depended had been decided, and in the latter case their Lordships distinguished the case before them from cases in which the decision reversed had proceeded upon a preliminary point, and observe with reference to such cases that the practice of the Allahabad High Court in treating orders of remand interlocutory was probably quite correct. In *Chandra Kunwar* v. *Chauddhri Narpat Singh*[5] the appeal was heard by the Privy Council, but it is not clear to us that the decision reversed by the High Court had proceeded merely upon a preliminary point: there is no discussion of this question in the report, and it does not appear that objection was taken to the competency of the appeal.

In *Ahmed Hussain* v. *Gobind Krishna Narain*[6] the High Court declined to grant a certificate in a case similar to the present cases and did not refer to *Chandra Kunwar* v. *Chaudhri Narpat Singh*[5].

1 (1889) I. L. R. 13 M. 349.
2. (1890) I. L. R. 15 B 155 (A.C)
3. (1899) I. L R. 17 A. 112.
4. (1900) I. L. R. 23 A. 220 (P.C.)
5. (1906) I. L. R 29 A. 184 (P. C.)
6. (1911) I. L. R. 33 A. 391.

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In *Forbes* v. *Ameer-oon-nissa Begum*[1] an order of remand is described as an interlocutory order. There is thus no decision of the Privy Council to the effect that orders like those made in the cases before us are final orders within the meaning of the provision of law in which we are considering; and the only authority in this court points the other way.

We are asked to hold that under the present Code of Civil Procedure these orders must be deemed to be final, because under S. 105 of that Code it is necessary to appeal against them without waiting for final decision of the case. S. 105 of the Code does not apply to appeals to His Majesty in Council, and does not we think operate to give a new meaning to the word "final" in S. 109, or supply a guide to the interpretation of that section. On this point we agree with the observations in *Ahmad Husain* v. *Gobind Krishna Narain*[2].

A different view was taken in *Saratmani Debi* v. *Bhattakrishna Banerjee*[3] where most of the decisions are considered, and it may be that that case is distinguishable from *Krishna Chandra* v. *Ram Narain*[4] where the judgment does not give reasons at length. But we think that the observation in *Muzhar Hossein* v. *Mussamat Bodha Bibi*[5] support the authority of *Tirunarayana* v. *Gopalasami*[6] and that we ought to follow the decision.

We reject the petitions.

The Petitioner will pay to the 1, 2, 3, 5, 6, 7, 9, 11, 15 and 16th respondents in C. M. P. 283 of 1910 Rs. 102-0-0 and to the 1, 2, 4, 7 to 12, 18 and 19th Respondents in C. M. P. 284 of 1910 Rs. 102-0-0 for their costs of these petitions.

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1. (1865) 10 M. I. A. 359.
2. (1911) I. L. R. 33 A. 391.
3. (1909) 10 C. L. J. 386.
4. (1913) 18 C. L. J. 124.
5. (1894) I. L. R. 17 A. 112.
6. (1889) I. L. R. 13 M. 349.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Adusumilli Suryanarayana and another.	*Appellants in all the second Appeals**	*(Plaintiffs 2 and 3)*
v.		
Atchuta Potanna and others.	*Respondents in S. A. No. 1205 of 12.*	*(Defendants.)*
Battula Seshayya	*Respondent in S. A. No. 1207 of 12.*	*(1st Defendant.)*
Kosuri Venkataratnam and others.	*Respondents in S. A. No. 1208 of 12.*	*(Defendants.)*

Estates Land Act S. 3 cl. (r)—Jurisdiction—Inam—Minor Inam and whole village inam—Presumption of grant of melwaram—Irrespective of purpose and grantor—Crown grant and Zamindar's grant—No difference between—S. 6 cl (2), S. 8 and exception—" Acquired," meaning of—Surrender or abandonment—Acquisition by, if within—Original grant—Tests for determination of the nature of—Commencement of tenancy and possession of present tenants, difference between—Grant to Brahmins—Inference, in case of.

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Whether it is a Zamindari, or a whole village inam or a minor inam situate in a Zamindari or an inam village, the presumption is the same *viz.*, that the grant is only a grant of the melwaram and it lies on the grantee to show that the grant was of both the Melwaram and the Kudivaram or that he owned the Kudivaram when the inam was granted. This presumption arises irrespective of the connection in which the question arises (*i.e.*, equally when a question of civil court's jurisdiction is involved and when the suit is for ejectment of the tenants on the land) and also irrespective of the person who is said to have originally made the grant (*viz.*, whether it is the Crown or the Zemindar.)

The rule laid down in S. 6, cl. 2 is not confined to Zamindaries and extends also to inams.

Per *Sadasiva Aiyar* J. (*Spencer* J. contra) The term "acquired" in exception to S. 8 does not include acquisition by surrender or abandonment.

Per *Spencer* J. In the absence of evidence to the contrary when after a surrender or abandonment, the inamdar grants the land to other tenants, the presumption is that he grants it again on the old terms i.e., with occupancy rights.

In the determination of the question whether an inam consists of both the warams or only of the melwaram it is not so much the commencement of the possession of the present tenants that is important as the commencement of the tenancy; where it is shown that the tenancy originated in leases containing a

* S. A. Nos. 1205, 1207 and 1208 of 1912. 9th October 1913.

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clause that the tenants should vacate at the end of the term, a presumption arises in favour of the inamdar being the owner of both the warams.

Where the original grant is to Brahmins, the inference is strong against its being of both the warams.

Circumstances in favour of and against the original grant being of both warams considered.

Second appeals from the decrees of the District Court of Kistna at Masulipatam in Nos. 472, 473 and 474 of 1911, preferred against the decrees of the Additional District Munsif of Masulipatam in O. S. Nos. 271, 272 and 275 of 1909, respectively.

These were suits in ejectment by certain Agraharamdars the present plaintiffs being purchasers from the original agraharamdars. Out of the 7 items in dispute in the 3 suits, three were inams and plaintiffs purchased those inams and brought the suits to eject the defendants in respect also of these lands. The District Munsif dismissed the suits holding on the evidence that the defendants had not made out occupancy rights and that defendants had failed to establish that the Agraharam was an estate. In all these 3 cases the defendants concerned were let into possession by the plaintiffs under lease for fixed terms which provided that they should give up possession at the end of the term. The suits were brought after notice to quit.

L. A. Govinda Raghava Aiyar for Appellants.

V. Ramesam for Respondents.

L. A. Govindaraghava Aiyar.—The main question is whether the Agraharam has been shown to be an estate within the meaning of S. 3 Estates Land Act. The burden is on the defendants. In a case like this the tenants must show that the melwaram alone was given to a person not owning the kudivaram thereof at the time of the grant. This burden has not been discharged. *Indety Chinna Nogadu* v. *Poti Konchi Venkatasubbayya*[1], *Rajaram Rao* v. *Sundaram Iyer*[2]. Apart from this there is evidence that the original grant must have been grant of the land itself not merely of the melwaram. Whatever the presumption may be it cannot be disputed that the sovereign, if he chooses, can grant both warams in inam. Here the original grant was by Reddi Kings. By Ex. 7 a confirmatory grant the agraharamdar was to cultivate as much as he could and enjoy the produce. Throughout the village there has been constant change of tenants in regard to the holdings and the suit lands were at the absolute disposal of the agraharamdar at the

1. (1910) M. W. N. 639. 2. (1910) M. W. N. 566.

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time the defendant's were let into possession. The agraharamdar having always dealt with the lands as absolute owners thereof and the tenants never having objected, this course of conduct must be traced to a legal origin and so it follows that the original grant must have comprised both the warams. *Rajrup Koer* v. *Abdul Hossain*[1]. A large portion of the agraharam seems to have consisted of waste land even down to the year 1884 and this justifies the presumption that at the time of the grant the whole agraharam must have been practically waste. The facts of this case are very similar to those in *Virabhadrayya* v. *Sonti Venkanna*[2]. There on the facts proved, it was held that the original grant consisted of both the warams. The facts here warrant the same conclusion. Even assuming that the original grant was only of the melwaram, if the lands were waste then the agraharamdar could in letting tanants in possession of such lands settle his own terms. *Rajya* v. *Balkrishna Gangadhar*[3] *Lakshmi Narasimha* v *Sitaramaswami*[4].

The plaintiffs are entitled to succeed also on another ground. Assuming that originally melwaram alone was granted, under the exception to S. 8 of Estates Land Act, the suit lands have ceased to be part of the estate, the landlord having acquired full ownership in all of them prior to letting them to the defendants. The word used in the exception is 'acquired' and so all modes of acquisition are contemplated. The District Munsif has traced the history of the holding in each of these cases and is clear that before the defendants got the lands under the muchilikas. Exhibit A, both the warams had vested in the agraharamdar.

The case as regards inam lands is still clearer. If it is assumed that the grantees of the inam were in possession of the inam lands at the time of the creation of the inams the inam grant would make such persons owners of both warams and in as much as the plaintiff purchased from them, they became the owners of both the warams and as such they are entitlel to evict the defendants who came in as the tenants for a term.

V. Ramesam.—As regards the question of onus of proof, before the Estates Land Act it was a rebuttable presumption that a grant of land was only of Land Revenue. No doubt the grant could be of the soil also *Rajya* v. *Balkrishna Gangadar*[3]. But we must start with the presumption that only Land Revenue was granted in

1. (1880) I. L. R. 6 C. 394.
2. (1913) 24 M. L. J. 659.
3. (1905) I. L. R. 29 B. 415, 420.
4. (1913) 21 M. L. J. 288 at 290.

inam; *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai*[1], *Venkatacharlu* v. *Kandappa*[2]. In *Parthasarathi Appa Row* v. *Chevendra Venkata Narasiah*[3] a case disposed of in 1902 the onus to eject the defendant was placed on the plaintiff. The person who says that kudivaram also was granted should allege and prove it. *Nadu Errayya* v. *Kanjali*[4]. Plaintiff should prove his right to eject under all circumstances. In S. A. 137 of 1908 it was held that plaintiff, an inamdar, should prove that he was the owner of both the melwaram and kudivaram. In S. A. 705 of 1909 it was held that plaintiff should prove that the defendants had no occupancy rights. In this case the grant was under a deed of gift dated 1762. *Bhadrayya* v. *Bapayya*[5] approves of S. A. 705 of 1909. *M. Tharalu* v. *T. Nilakanta*[6] is distinguishable on the ground that there the inamdar was the owner of both the warams. That there has been a change of tenants and that the lands were lying fallow in certain years etc., cannot shift the onus to the defendant. In *P. Venkataramia* v. *P. Narayudu*[7] the grant was before the permanent settlement. There it was held that as the Zamindar had no kudivaram right in the land, the grant there was only of the melwaram *Lakshmi Narasimha* v. *Sitaramaswami*[8] expresses the position clearly. The inam granted would be only the melwaram. Probably it would be made to the occupant. But none the less he must show his right to eject. The inamdar should show that either both the warams were granted or the land was waste at the time of the grant.

· These cases are apart from the Estates Land Act. From these the general proposition is deducible that the landlord should displace the presumption that kudivaram is in the tenants. Now the Estates Land Act does not change the law as regards onus. The question is whether any particular village is an estate. A survey of the land revenue history of India will show that the onus is always on the tenants. Estates Land Act was passed to protect the rights of the tenants. In *Indeti Chinna Nayudu* v. *P. K. Venkatasubbayya*[9] the suit was for rent in a small cause court. The case was not fully argued. The position there laid down that there is no presumption that the melwaram right was granted to a person not owning the kudivaram thereof can be reconciled on the footing

1. (1876) I. L. R. 1 B. 523.
2. (1891) I. L. R. 15 M. 95.
3. (1910) 20 M. L. J. 596.
4. (1910) I. L. R. 34 M. 246.
5. (1909) 21 M. L. J. 803.
6. (1907) I. L. R. 30 M. 502.
7. (1912) 12 M. L. Times 813.
8. (1913) 24 M. L. J. 288.
9. (1910) M. W. N. 689.

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that the maxim of law is that jurisdiction of civil courts is presumed until the contrary is shown. The finding of the lower court in *Veerabadra* v. *S. Venkanna*[1] was that the land fell under cl. (e) of Sec. 3 (2). The contention was that no inam can fall under cl. (e). It was assumed that the land did not fall under cl. (d) and *Indeti Chinna Nagudu* v. *Potu K. Venkatasubbayya*[2] was followed, so that the principle seems to be that in a suit for rent the onus is on the tenant, as a question of jurisdiction arises and in a suit in ejectment the onus is on the plaintiff landlord.

As regards the acquisition of kudiwaram right by the agraharamdar or inamdars the question is whether such an acquisition, as is alleged to have been in this case, namely by relinquishment or abandonment by the tenant is contemplated by the exception to S. 8. This mode of acquisition is not involved in 'acquired' in S. 8. See the words used in S. 6. Abandonment or relinquishment by the tenant of his right does not vest in the landlord the kudivaram right.

The Court delivered the following

Judgment:—*Sadasiva Aiyar*, J.—My learned brother has fully dealt with the facts and the points of law involved in these Second Appeals. I add a few words in my own language out of respect to the strenuous arguments advanced by the appellants' learned Vakil.

Having regard to the observations in the case reported in *Bhadrayya* v. *Bapayya*[3] and *Lakshmi Narasimha Row* v. *Seetaramaswami*[4] *Venkata Narasimha Appa Row* v. *Subba Reddi*[5] *Narasimhacharyalu* v. *Ramabrahmam*[6], *Veerabadra* v. *Sonti Venkanna*[1], and to the Judgment in Appeal No. 437 of 1908 and S. A. No. 168 of 1912, I think that no distinction should be made between an Inamdar and a Zemindar as to the presumption to be raised in respect of the kudivaram right in lands of which the Inamdar or the Zemindar is the proprietor. In other words the presumption ought to be that the Inamdar or the Zemindar is not the owner of the kudivaram. There are, no doubt, some observations in the cases of *Indety China Nagadu* v. *Potu Konchi Venkatasubbayya*[2] and *Marapu Tharalu* v. *Telukula Neelakanta Behara*[7], which favour the appellants' contention. But the authority of those cases can no longer be relied on having regard to the uniform

1. (1913) 24 M. L J. 659.
2. (1910) M. W. N. 639.
3. (1909) 21 M L. J. 803.
4. (1913) 24 M. L. J. 288.
5. (1912) 24 M. L. J. 655.
6. (1912) 24 M. L. J. 656
7. (1907) I.L.R. 30 M. 502.

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tendency of the later decisions. The distinction made in oneof the two cases between the presumption to be drawn where the jurisdiction of the civil courts will be ousted if the Inamdar is held not to own the kudivaram, and the presumption to be drawn if no such question of jurisdiction arises in the suit, seems to me (with the greatest respect) a little too fine and far-fetched.

The other contention of the appellants that an Inamdar could acquire the kudivaram through abandonment or surrender by the tenant of the holding and that, when he so acquires it, the holding ceases to be a part of the Inam estate, has caused me much more anxiety before I could arrive at a decision satisfactory to my mind. The exception to S. 8 uses the general expression " the kudivaram interest has been or is acquired by the Inamdar."

Mr. Ramesam's argument is that, as it is an exception to S. 8. the modes of acquisition mentioned in the preceding clauses of S. 8 ought to be looked into to find out what the meaning of " acquired" is as used in the exception. These preceding clauses speak of acquisition by transfer, succession or otherwise. And, according to the decisions of the Calcutta High Court on the corresponding section of the Bengal Tenancy Act, (See *Badan Chandra Das* v. *Rajeswari Debya*[1] and *Muktakeshi Dasi* v *Pulin Behary Singh*[2] This does not include acquistion by mere abondonment or surrender. Again, S. 6 clause 2 of the Estates Land Act is as follows:—"Where land held by a ryot with a permanent right of occupancy, is *surrendered or abandoned or save in the case fallinj within............... ....the exception to* 8, comes into the possession of the land-holder." This shows that the exception to S. 8 which relates to acquisition of the kudivaram right by the land-holder is distinguished from the case where the land-holder gets power to deal with the land through surrender or abandonment by the tenant, in other words, a right got by the landlord through surrender or abandonment of a holding is put under a different category from a right to. kudivaram acquired under the exception to S. 8.

As the appellants' possession of some of the lands during an occasional year or two arose out of surrender and abandonment and not alienation or succession derived from the tenant, the exception to S. 8 cannot be relied upon, and the contention that those lands should be part of the estate therefore fails.

As these suits, on the above conclusions, have to be brought in the Revenue court, the plaints in the suits will be returned to

1. (1905) 2 C. L. J. 570. 2. (1909) 8 C. L. J. 324.

the plaintiffs to be returned to the proper court. The costs up to date must be paid by the appellants.

Spencer J.--Seven items of lands are in dispute in these appeals; three are minor inams included in an Agraharam, and the others are ordinary Agraharam lands. The District Munsif found on the second issue that the suit lands were not portions of an estate within the meanings of 3, cl. 2 (d) of the Estates Land Act. He placed the burden heavily on the defendants of showing that the village in question came within the definition and found that they had failed to discharge it.

The District Judge, finding no evidence of an original grant of both warams and, adopting it as a legal presumption that both were not granted, found this issue for the defendants, and dismissed the suits owing to the want of jurisdiction in the District Munsif to dispose of them when the property concerned was an estate falling under S. 3, cl. 4 (d) of the said Act.

No deed has been produced to show the terms of the original grant. But it appears from Exhibit GG and EE2 that this Agraharam was given by a Reddi Rajah to Agraharamdars of the Ivaturi family and that it is a Sarva Agraharam paying nothing to the Circar. The plaintiffs were purchasers from the original grantees. The original grantees were Brahmins, and the District Judge finds that it was only in 1846 that one of the Agraharamdars became a resident in the village owing to the difficulty of collecting rent at a distance.

Mr. Govindaraghava Aiyar for the appellants raises three contentions: (1) that the original grant was of both kudivaram and melvaram, (2) that the subsequent conduct of the parties must be traced to a legal origin, from which the original grant of both varams can be deduced, and (3) that the plaintiffs have acquired the kudivaram right even if they did not have it originally, and that by the nature of such acquisitions the exception to S. 8 of the Estates Land Act takes the case out of the purview of the Act.

The District Judge expressed his inability to conclude from the evidence that both varams were granted in the first instance, and therefore he fell back on the legal presumption that the melvaram only was granted. We find no sufficient reasons for not accepting the District Judge's finding on questions of fact. After a careful consideration of his judgment and a comparison of the conclusions drawn by him with the evidence on which they are based, we are not able to discover any misstatements of facts of any importance

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or any mis-construction of documents. The *pros.* and *cons.* of every argument have been considered by him with reference to the evidence on record in paragraphs 6 to 12 of his judgment, and we cannot see that the conclusions he comes to at the end are unreasonable or unsupported by evidence. On the first point for the appellants, great stress has been laid on the language in Exhibit E E 7. This purports to be a deed of gift confirming a prior grant of the Agraharam in favour of a member of the Ivaturi family. It contains a clause permitting the grantee "to go on getting the lands cultivated extensively and to enjoy the produce thereof from generation to generation." It is a question whether this clause affected or was intended to affect the rights of the cultivating tenants. The District Judge declined to draw any conclusive inference from the words so used. He remarks that similar words might be used if the rights of melvaram alone were granted. He alludes to the fact of which he finds clear traces that the village was inhabited and cultivated at the time when the earliest grant came into existence and that the soapnut trees were the special perquisite of the Agraharamdars. We do not think that the grant is so expressed as to leave no doubt that the intention of the donor was to deal with the rights in the soil.

The expression 'to enjoy the produce of the land' appears to be not uncommon in grants of inams, and a similar expression has been interpreted in *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai*[1] as meaning only an alienation of the land revenue. In S. A. No. 705 to 814 of 1909 (unreported) the expression 'to get cultivated and enjoy', was interpreted by the District Judge as implying that the grant was one of both warams and his finding was accepted but in that case there were other reasons for considering that the lands were not cultivated previously. Here there is nothing to show that the suit lands were not cultivated previously, although there is some ground for thinking that the agraharam contained a considerable portion of unoccupied and waste lands at one time. In *Rajya* v. *Balkrishna Gangadhar*[2], it was assumed in a case where the sanad was not produced that the grant was one of the Royal Share of Revenue, and it was observed that, if owing to antiquity there was no evidence of the commencement of a tenancy, it might be presumed to be co-extensive with the duration of the tenure of the landlord. In *Lakshmi Narasimha Row* v. *Sitaramaswami*[3], a presumption was raised that the Government did not intend to

1. (1875) I. L. R. 1 B. 523. 2. (1905) I. L. R. 29 B. 415.
3. (1913) 24 M. L. J. 288.

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deal with the rights of the occupants when they made the grants, the ryots in that case being tenants of a Mokhasa in a Zamindari. The presumption is the same whether the grant of the Inam was by Government or by a Zamindar. So the fact that the grant in this case was made by certain Reddi rulers of that part of the country will make no difference.

In *Vaman Janardan Joshi* v. *The Collector of Thana and the Conservator of Forests*[1], the rule of English Law as to the construction of grants to subjects by the Crown was held to be the correct rule to be applied by the Courts in India in construing grants by former governments. In that case, words to the effect that the grantees were to enjoy the inam grant of the village hereditarily without disturbance were held not to operate as an alienation of the soil of the village. The headnote in the *Secretary of State for India* v. *Subbarayudu*[2], is quoted to show that a grant of land could not be split up into a grant of Melvaram and a grant of Kudivaram without words in the document to that effect, but the decision is one dealing with a case of Archaka inam and applying S. 4 of the Pensions Act, 1871. It cannot be taken as restricting the Court from putting the proper construction on the documents filed in the present case.

On the second contention, the District Munsif finds as a conclusion of fact on the evidence that all the defendants had only recent possession of the suit items, that the items concerned in S. A. No. 1207 were subject to changes in tenants, that one of them was home-farm in fasli 1305, that two were waste for a time, and that there was variation in rent in respect of one. He also found that the tenant of the inams concerned in S. A. No. 1208 was ejected in 1883 and that it was home-farm land in fasli 1306. The District Judge also refers to the change in holdings evidenced by the Amarakam accounts, to mortgages and sales of the land, not merely of the Melvaram share in the land, to grants of inams by the Agraharamdars, to cases of eviction, to conditions in the *Khats* under which the tenants agreed to quit at the end of their tenancy, and to high prices at the sales of land. On the other hand, he finds that the Agraharamdars were non-resident Brahmins not to be found in the village till 1846, and the District Munsif finds that many of the old cowles contained no stipulation to quit; (vide Exhibit XIII series). In fact, the finding of both the Courts is that these tenants obtained possession of the suit lands recently and that some of them had been in the possession of some other tenants and some were allowed to lie waste.

1. (1869) 6. B. H. C. R. 191. 2. (1912) 23 M. L. J. 728.

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In *Bhadrayya* v. *Bapayya*[1], failure on the part of ryots to prove permanent occupation of their predecessors, the fact of other ryots having no proved connection with the defendants cultivating in a few stray years, admissions by ryots of other inamdar's Kudivaram right, past admissions by a holder of a portion of the plaintiff's inam of his right to eject, and want of uniformity in the rents were facts considered and held to be insufficient in the circumstances of that case to prove a right to eject.

In cases of change of possession the presumption applied in *Cheekati Zamindar* v. *Ranasooru Dosra*[2], must be applied to this case, viz., that when new occupants are admitted to the enjoyment of waste or abandoned land, the intention is that they should enjoy on the same terms as those under which the prior occupants held, unless this presumption is rebutted by proving that the usual condition of things did not prevail in the particular estate or that particular contracts were made with the tenants.

Courts have now to be guided by the rules in 6 and 8 of the Madras Estates Land Act, which embody the presumptions formerly recognised in reported decisions. It is not the commencement of possession of the present tenants that is so important as the commencement of the tenancy, and neither the District Munsif nor the District Judge has been able to find the origin of the tenancy in each case. If in these Second Appeals we had a finding that the tenancy originated in leases containing definite terms that the tenants concerned in this litigation should vacate at the end of their term, the position might be very different.

Our attention has been called to some evidence of recent occupation, and the terms of the Khats in recent years are in favour of such a finding. But there is no finding by the District Judge that the defendants are tenants at will or tenants from year to year. He says in paragraph 16, " All that this evidence shows is that defendants came into possession of the " suit lands very recently and not as they alleged from time immemorial. But it is also clear that the lands had been continuous under the occupation of tenants with an occasional break for *banjar* and in some cases a year of cultivation by the plaintiff as *Kamatam*. Therefore, it is certain that these lands are *seri* lands and not *Kamatam* lands and therefore occupancy right exists in them". The evidence being inconclusive the District Judge finally gave effect to the legal presumption that there was no grant of Kudivaram to the Agraharamdars.

1. (1909) 21 M. L. J. 803. 2. (1899) I. L. R. 23 M. 318,

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The presumption of occupancy rights in the tenants in Zamindaris has been established by a long course of decisions before the introduction of the Madras Estates Land Act. In this connection it is sufficient to refer to *Venkatanarasimha* v. *Dandamudikotayya*[1], as the Land Estates Act has now introduced a statutory presumption in favour of Zamindar's tenants.

As regards agraharams and whole inams, which, if the agraharamdar or inamdar does not own the Kudivaram, will now fall under S. 3 clause 2 (d) of that Act, three of the most recent decisions dealing with agraharams in the Kistna District are reported, *Venkata Narasimha Appa Row* v. *Subba Reddi*[2], *Narasimha Charyulu* v. *Ramabrahmam*[3], *Veerabhadrayya* v. *Sonti Venkanna*[4]. The appellants rely on the decisions in *Rajaram Row* v. *Sundaram Aiyar*[5], and in S. A. No. 561 of 1908 (unreported) *Marapu Tharalu* v. *Telukula Neelakanta Behara*[6], and *Veerabhadrayya* v. *Sonti Venkanna*[4], as being in their favour. In *Marapu Tharalu* v. *Velukulu Neelakanta Behara*[6], it was held that the presumption in favour of Zamindari tenants could not be extended to the case of inamdars, whose position materially differed from that of Zamindars. The learned Judges who decided that case, *Boddam* and *Wallis* JJ. stated reservedly that *as the case then stood* they were not prepared *necessarily* to apply the same presumption to persons becoming tenants to inamdars. The Estates Land Act must be taken to have altered the position as regards whole inams also and with all deference to the opinion of those learned Judges we think that this decision can therefore no longer be taken as an authority for the general proposition that there is a presumption that the tenants of inamdars have no occupany rights. In *Indety China Nagadu* v. *Potu Konchi Venkatasubbayya*[7], an observation occurs hat there is no presumption that an inam was granted to a person not owning the Kudivaram, whatever may be said as to there being a presumption that the inam was only a grant of the land revenue. The onus was placed on the defendant to show that the village came within S. 3, clause 2 (d) of the Act. In Appeal No. 137 of 1908 (unreported) the Court declared that there was no presumption that an inamdar was the owner of both Kudivaram and Melvaram rights in the inam. In this respect the decision in *Srinivasa Chetti* v. *Nanjunda Chetti*[8], was followed. That case related to a

1. (1897) I. L. R. 20 M. 299
2. (1912) 24 M. L. J 665
3. (1913) 24 M. L. J. 653
4. (1913) 24 M. L. J. 659
5. (1910) M. W. N. 566
6. (1907) I. L R. 30 M. 502
7. (1910) M. W. N. 639
8. (1881) I. L. R. 4 M. 174

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Mittadar, and it was held that he must prove that he had Kudivaram as well as Melvaram before he could treat the tenancy as one from year to year. In *Venkatacharlu* v. *Kandappa*[1], in an ejectment suit the burden was thrown on the inamdar of proving that under the terms of his tenancy he had a right to eject his tenant. In *Narasimhulu* v. *Narasimhulu*[2], the principle was recognised with reference to S. 13 (1), (ii) of Act III of 1895 and the preamble to Madras Act VIII of 1869 that inams are *prima facie* to be taken as assignments of the Melvaram right only. For the purposes of that Act the above mentioned section contains a special proviso reserving the jurisdiction of Civil Courts over suits for the recovery of the land itself.

In *Narasimhacharyalu* v. *Ramabrahmam*[3], a presumption was said to arise that an Agraharamdar who obtained his inam from the Nuzvid Zemindar had only the Melvaram rights. In *Venkata Narasimha Appa Row* v. *Subba Reddi*[4], in the absence of evidence that the Inam grant included the Kudivaram or that the inamdar was himself the owner of the Kudivaram at the time the inam was granted, it was held that an Agraharam village was an estate within the meaning of S. 3 of the Estates Land Act. The learned Judges observed that a Brahmin was not likely to have been a cultivating tenant, an observation which applies to the present case. The decision in *Veerabadrayya* v. *Sonti Venkanna*[5], related to a Sarva agraharam granted by a Nuzvid Zemindar and treated as Lakhiraj at the settlement and excluded from the Zemindari and afterwards enfranchised at the Inam settlement. On the facts of that case both the Courts came to a concurrent finding that Kudivaram and Melvaram rights had always belonged to the Agraharamdars and their predecessors in title. The judgment admits the difficulty arising from the onus falling on different parties for different purposes. We feel no doubt that the burden of proving that the Court has no jurisdiction to try the suit will fall on the party which seeks to oust the Court's jurisdiction, but where in the absence of conclusive evidence one way or the other, neither side is in a position to show where the jurisdiction lies, the natural presumption which Courts have recognised about grants from the Crown being grants of revenue only, comes into play and will have the effect of shifting the onus to the party to whom it is disadvantageous. In *Suri Venkata Subbaraya Sastri* v. *Darappareddi Kristnaiya*[6], the onus was placed on the plaintiff in a suit for eject-

1. (1871) I. L. R. 15 M. 95
2. (1906) 16 M. L. J. 333
3. (1913) 24 M. L. J. 656
4. (1912) 24 M. L. J. 655
5. (1913) 24 M. L. J. 659
6. (1910) 20 M. L. J. 526

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ment by an inamdar to prove his title to eject. In that case the defendants (vendors) came into possession on condition of paying the arrears. In *Appa Row* v. *Subbanna*[1], the presumption laid down by a course of decisions was stated to be that a pattadar or ryot in a Mitta was entitled to continue in possession so long as he regularly paid rent and had a saleable interest. In S. A. No. 561 of 1908 (unreported) a presumption was raised, where the occupancy right was not found, that the tenancy was from year to year, but it does not appear from the judgment what was the nature of the holding. These three as well as the three decisions reported in the 24 M. L. J. are all cases from the Kistna District. Each of these authorities must be considered in the light of the facts and findings of the particular case. S. A. No. 168 of 1912 (unreported) was a case of a Darmilla Inam (or Inam granted by Zemindar after permanent settlement) which was held to be part of an estate and it followed therefrom that the Civil Courts had no jurisdiction under the Estates Land Act. This, apparently, was a case falling under S. 3 cl. 2 (e).

In *Rajaram Row* v. *Sundaram Aiyar*[2], there is only a finding by the Subordinate Judge of Tànjore that the Tanjore Palace estate had ceased to be an estate within the meaning of the Act.

As regards minor Inams in the Agraharam, it is argued that as between the minor inamdar and the tenant none of the presumptions either in the Estates Land Act or otherwise apply. But we are clearly of opinion that the Agraharamdar could not have granted more than what he had to give, and therefore if he did not possess the Kudivaram, it follows that the minor inamdar also did not have it. This is pointed out in *Maddu Yerrayya* v. *Yadulla Kangali Naidu* [3], which is also published in I. L. R. 34 Madras 246, in these words, " If the plaintiffs' Inam were in a Zemindari they could not be in a better position as regards the right to eject the defendant than the Zemindar who created the Inam". Similar observations occur in S.A. Nos. 705 to 714 of 1909 to the effect that an inamdar stands in no better position than the Zemindar if the inam is carved out of the Zemindar's interest; also in *Bhadrayya v. Bapayya*[4]. The position in this suit of the tenants under the minor inamdars appears to be stronger than that of the other tenants of the

1. (1907) I. L.R. 13 M. 60
2. (1910) M. W. N. 566
3. (1910) 20 M. L. J. 764
4. (1911) 21 M. L. J. 803

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Agraharamdars, and the inamdar must show that he let in the defendants as tenants at the beginning of their occupation (Vide *Parvataneni Venkatramiah* v. *Parvataneni Naraynadu* [1]) On the whole we consider that the view taken by the District Judge of the legal presumptions arising in this case is correct.

On the third contention that the plaintiffs have acquired the Kudivaram rights in these lands it was held in *Ganpatra* v. *Putwardhan* v. *Ganesh Baji Bhat* [2] that a Saranjamdar or Inamdar might acquire occupancy rights by cultivating unoccupied land himself or through tenants. This principle corresponds to the statutory provision in the exception to S. 8. We are not prepared to accept the appellant's contention that S.6 (2) of the Estates Land Act was intended only to apply to Zemindaris, nor am I disposed to place a narrow interpretation on the word 'acquired' in the exception to S. 8 so as to exclude acquisition by surrender or abandonment. The second clause of S. 6 simply excludes that form of acquisition in whole Inam villages for the purposes of that particular clause. In my opinion, this exception must be read with S. 6 clause 1, where the word ' acquired ' occurs again, and with S. 3 (7), which gives ten years for a land to be permanently uncultivated or let without occupancy rights as the limitation period which must elapse before rights can be thus ' acquired ' by the landholder. An inamdar apparently may acquire Kudivaram rights by transfer, succession or otherwise, *e. g.*, by purchase at any time, but a Zemindar's acquisition by such methods is subject to the restrictions contained in clauses 1 to 4 of S. 8. It does not appear from the findings on the facts of this case that the plaintiff's have thus acquired the Kudivaram right in any particular holding concerned in these suits. The presumption, therefore is that laid down in *Cheekati Zamindar* v. *Ramasooru Dosra*[3], that new occupants of waste or abandoned holdings enjoy on the same terms as those under which prior occupants held.

The result will be as stated in my learned brother's judgment.

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1. (1912) 12 M. L. T. 313
2. I. L. R. 10 B. 112.
3. (1899) I. L. R. 23 M. 318

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Sornalinga Mudaliyar *Petitioner.—Plaintiff**.

v.

Paitai Naiken alias Pachaiyappa Naiken and others. } *Respondents (Defendants).*

Negotiable Instruments Act, S. 43—Joint promise—Money paid to some—Consideration for promise by all—Agreement excluding liability of executant of pronote—Admissiblity of—Law merchant—Evidence Act S. 92,

Sornalinga Mudaliyar *v.* Pachaiyappa Naiken.

Where several persons make a joint promise in consideration of money paid to some of them the contract is not without consideration with respect to the promise by the others and all are equally liable on the promise.

It is not open to the executant of a promissory note who is liable according to the tenor of the note to prove a contemporaneous (oral) agreement with the promisee excluding liability.

Sesha Aiyar v. *Mangal Dossjee*[1], considered; *Narasimham* v. *Ramaswami*[2] *followed,*

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Poonamallee in Small Cause suit No. 473 of 1911.

S. Ramaswami Aiyar for *T. Arumainatham Pillai* for Plaintiff.

K. V. Krishnaswami Aiyar for Respondent.

The Court delivered the following

Judgment:—*Sadasiva Aiyar J.* The District Munsif is in error in holding that where several persons make a joint promise in consideration of money paid to some of them, the others are entitled to contend that, because no portion of the consideration was received by them, there was no legal consideration for their own joint promise. The consideration paid to any of the joint promisors is legally sufficient to support the promise of all the joint promisors.

As regards the case of *Sesha Aiyar* v. *Mangal Dossjee*[1] the learned judges seemed to have held that the single executant of a promissory note could show that there was no consideration for the only promise relied on, namely the promise by that single executant. If the learned judges intended to decide that a person who has made himself liable according to the tenor of the pronote

*C. R. P. 719 of 1911 20th November 1913

1. (1909) 20 M. L. J. 144 2. (1913) 24 M. L. J. 91

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Sadasiva Aiyar

could prove that he and the promisee agreed contemporaneously that he should not be held liable. I respectfully differ from that view, as it is opposed to S. 92 of the Evidence Act and to the Law merchant.

The case of *Narasimham* v. *Ramaswami*[1] shows that as against the holder, one of the joint executants cannot be permitted even to prove that he was a mere surety. The plaintiff's contention as to subsequent interest and costs must also be allowed.

In modification of the Lower Court's decree a decree will issue in the plaintiff's favour against the five defendants for the sum decreed by the Lower Court with interest at 6 per cent. per annum from the date of suit and costs in the Lower Court. The costs of this revision petition will be paid by the 5th defendant to the plaintiff.

Spencer J :—The Respondent (5th Defendant) in his written statement said he signed the plaint promissory note believing the plaintiff, who said that if his name was on the note as that of a person jointly liable, the other defendants would take an interest in discharging the debt. From this it appears that he signed as a surety. The District Munsif seems to have thought that there was no consideration as between the plaintiff and the 5th Defendant, but S. 127 of the Contract Act shows that the value received by the principal debtor is a sufficient consideration to him, the surety, and S. 128 makes his liability co-extensive with that of the principal debtor. He is clearly precluded by S. 92 of the Evidence Act from setting up a contemporaneous agreement that he should not be made liable on the promissory note, (vide *Narasimham* v. *Ramasami*[1].) No doubt a promissory note that is without consideration creates no obligation between the parties to the transaction (S. 43 of the Negotiable Instruments Act) but the District Munsif has made the other persons (Defendants Nos. 1 to 4) who signed it, liable. This is therefore, not a case in which the negotiable instrument was made without consideration. The Respondents' pleader relies on the case of *Sesha Aiyar* v. *Mangal Dosjee*.[2] This was not a case of several executants but of one executant. There was a finding that the promisor was a mere namelender for the real obligor, and therefore the learned judges who decided that case held that there was no consideration by which the former could be bound.

I therefore agree in the order now pronounced by my learned brother.

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1. (1913) 24 M. L. J. 91

2. (1909) 20 M. L. J. 144

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji

Phatmabi — *Appellant in both cases—Plaintiff.**

v.

Haji Abdulla Musa Sait — *Respondent in both cases—Defendant.*

Mutwalliship—Succession—Modes of—Hereditary right—Basis of—Three successions from one family—Presumption of hereditary succession as a term of dedication—Waqf for maintenance of founder's family—Claim to hereditary right by founder's family—Less strict proof necessary.

Phatmabi v. Haji Abdulla Musa Sait.

Under the Mahomedan Law, succession to the office of Mutawalli is regulated in any of the three modes viz., (1) by the terms of the waqfnama or the original dedication (2) by appointment by the last male holder or his executor and (3) by appointment by the Court.

A claim to a hereditary right to the office can only be supported as being in accordance with the actual or presumed directions of the founder at the time of the dedication

Where there has been a series of appointments of Mutawallis, it is presumed that the appointments have been valid and were made in accordance with the terms of the original dedication.

Where a hereditary claim is set up, the question is not merely whether the succession to the office of Mutawalli has for some time been devolving hereditarily but whether there are sufficient grounds for holding that the original dedication included a provision that the office should so devolve.

The Court will be satisfied with less strict proof where the waqf is for the maintenance of the founder's family or where the claim is set up by his family members than in other cases.

Apart from special circumstances the fact that three successive Mutawallis have been from one family is not sufficient to support the inference that it was one of the terms of the original dedication that the office should devolve hereditarily.

Per Sadasiva Aiyar J. :—A claim to succeed by hereditary right to a trustee's office or to a religious office or to any other office should be looked upon with strong disfavour by the Courts whether the office was created by a Hindu, Mahomedan, or an adherent of any other creed unless the terms of the original grant, or uniform custom constrains the Courts to decide in favour of its being hereditary.

Second appeals from the decrees of the Court of the Subordinate Judge of Kistna at Ellore in Appeal suit Nos. 227 and 300 of 1910 respectively preferred against the decrees of the Court of the District Munsif of Ellore in Original suit Nos. 448 of 1908 and 300 of 1905.

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*S.A. Nos. 1470 and 1471 of 1911. 2nd September 1913.

Phaimabi v. Haji Abdulla Musa Sait.

P. Narayanamurthi for Appellant.

V. Ramdoss for Respondent.

The Court delivered the following

Judgment—*Tyabji* J.—The plaintiff claims mesne profits in respect of certain waqf properties. The real questions involved in the suit and appeal were the subject of some discussion before us but the issues settled by the District Munsif shew that the contention of the plaintiff was that she succeeded to the office of Mutawalli of the waqf properties by hereditary devolution, and that she claimed possession of them on that footing as against the defendant, that the defendant on the other hand set up his own title as Mutawalli on the strength of an appointment by a person calling himself the Kazi, and also by the members of his community. The real question therefore to be decided by us is whether the plaintiff has made out that she was the actual and rightful Mutawalli of the waqf properties for three years succeeding 6th August 1905, and not whether the plaintiff has proved some circumstances which would entitle her claims to be considered, were the court asked to appoint a Mutawalli of the waqf properties. The relative qualifications of the plaintiff and the defendant to be appointed Mutawalli need not be considered by us, notwithstanding that as a defence to the plaintiff's claim, the defendant claims to be entitled to hold the office of Mutawalli himself. It may be that the defendant is not the rightful Mutawalli but that would not necessarily entitle the plaintiff to succeed in her suit.

The modes in which a person may come to hold the office of Mutawalli seem to be laid down in Baillie's Digest of Mahomadan Law (which it need hardly be said, is a translation merely of the Futwa Alamgiri) on page 693 of the edition of 1865 corresponding to pages 603 and 604 of edition of 1875. It would seem that there are three sources from which a person may trace his right to be Mutawalli.

(1) Appointment by the waqif (that is the original author of the waqf or by some person expressly authorised by the waqif to appoint; and in the absence of any person so authorised,

(2) Appointment by the executor of the waqif, and in the absence of such appointment,

(3) Appointment by the Court.

If the statement given above correctly represents the text of the Futwa Alamgiri then, any title to be a Mutawalli must be

derived from one of two main sources, namely, either the waqif himself, or the Court.

The authority vested in the waqif to appoint Mutawalli may be exercised either by himself directly or through another person, he may delegate his authority in any manner provided for by him at the time when the property is dedicated by way of waqf; in other words, at the time of the dedication he may lay down who shall have the power of appointing Mutawallis in future, and in what way the power to appoint must be exercised.

The terms of the dedication, including the provisions relating to the objects of the waqf, and to the management of the property belonging to it need not be reduced to writing, so that there need not be a waqfnama containing the terms on which the dedication to waqf is made. Where however the terms of dedications are formally reduced to writing in the shape of a waqfnama it is usual to include therein provisions relating to the appointment of successive Mutawallis. Hence, it is generally assumed that there must be some such provisions laid down by the waqif where the original dedication is not in writing, or at any rate where no document containing the terms of the dedication is produced. As a consequence of these assumptions where there has been a series of appointments of Mutawallis, it is generally assumed that the appointments have been valid, which implies that such appointments have been made in accordance with the terms of the original dedication relating to the mode in which the successive appointments have to be made. Thus from the history of previous appointments, the directions contained in the original dedication with reference to the mode in which the successive Mutawallis are to be appointed may be inferred. This inference, it is obvious, is based on what in a great number of cases must be recognised to be mere fictions, namely that the original dedication, even though it be oral and informal, contained specific provisions relating to the mode of appointment and, secondly, that the appointments in the past have been valid and in strict accordance with the provisions so assumed to be laid down at the time of the original dedication. It must frequently happen that at the time when the dedication is made there are no provisions laid down with reference to the appointment of successive Mutawallis. Again, it is quite in accordance with common knowledge that on the death of a person holding an office of such a character as the Mutawalliship of a waqf his descendants or relations should slide into the office without anyone being concerned to question their right to do so and without any pretence on the

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Tyabji J.

part of the new office holder that his succession is in accordance with the terms of the original waqfnama, or the expressed or implied desires of the waqif. On such successive acts of usurpation it is easy to found a claim that the office is hereditary, a claim which, however difficult it may be to resist in Court, may be quite opposed to the real intentions of the waqif.

Similary a claim to be a Mutawalli may be based on the fact that the last Mutawalli purports to appoint the claimant as his successor. The recognition of a claim based on such an appointment equally proceeds on the assumption that in the terms of the dedication the waqif empowered each Mutawalli to nominate his successor. The law does not directly empower the Mutawalli of every waqf to appoint his successor but if in regard to any particular waqf it is proved that the Mutawallis have been in the practice of nominating their successors, it is assumed that the practice had a lawful origin and was founded on some provisions contained in the waqfnama or some oral directions given by the waqif empowering the Mutawallis to nominate their successors. Provisions in the waqfnama empowering the Mutawallis to nominate their successors, are so usual that it would perhaps be representing the present state of authorities if it were said that the Courts assume the existence of such a provision in the dedication, unless the contrary is proved.

It will be seen therefore that a claim based on the allegation either that the office is hereditary or that the Mutawalli nominated the claimant as his successor must ultimately have reference to the actual or the presumed directions of the waqif at the time when the dedication was made.

The claim made by the plaintiff in this case must, if at all, be supported on considerations which must be brought under one of the various heads to which I have alluded.

Much reliance was placed by the pleader for the respondent on the observations in the case of *Syed Abdulla Edreus* v. *Syed Zaisi* [1] where it was said that where a custom is alleged " that the eldest son succeeds by virtue of inheritance that custom being opposed to the general law, must be supported by strict proof". It may, no doubt be conceded on the other hand that where the object of the waqf in question is not to support a public charity but to provide for the maintenance of a family, the Courts might be satisfied with less strict proof in order to hold that the management of the property devolves hereditarily on members of the

1. (1889) I. L. R. 13 B. 555 at 562.

family of the beneficiaries. To this consideration must be added the fact (which was also alluded to in *Syed Abdulla Edreus* v. *Syed Zairis*[1] that the law favours the claim of the members of the waqif's family to be Mutawallis and in the Asal it is stated that the judge cannot appoint a stranger to the office of administrator so long as there are any of the house of the appropriator fit for the office, and if he should not find a fit person among them, and should nominate a stranger, but should subsequently find one who is qualified he ought to transfer the appointment to him." (See *Baillies Digest* (1865) pages 593 to 594 (1875) page 604.

The result of these rules of law so far at present material would seem to be that the question in a case like the present is not merely whether the succession to the office of Mutawallis has for some time been devolving hereditarily but whether there are sufficient grounds for holding that the original dedication by way of waqf contained a provision to the effect that the office is to devolve hereditarily. I have already stated that in my opinion what may be considered sufficient grounds in the case of a waqf of one class may not be sufficient in the case of a waqf of another class.

In the present case there is no allegation, still less any proof, that the 'waqf' is of a nature which would in the ordinary course be expected to be administered by a succession of hereditary Mutawallis, chosen from one family. Hence there is no reason to consider the evidence in this case from an attitude more favourable to the plaintiff than is implied in the decision to which I have referred and it is not alleged or proved that the plaintiff has been nominated to be Mutawalli by the last office-bearer. Under these circumstances the facts on which the plaintiff relies, namely, that there have been from some time previous to 1874 three successive Mutawallis from the family to which the plaintiff belongs seem to me to be totally insufficient for supporting the allegation that in accordance with the terms of the original dedication, the Mutawalliship of the waqf ought to devolve hereditarily. I do not allude more fully to the various facts in this case on which the respondent relies as tending to throw doubt on the allegation that the three successive Mutawallis in question rightfully succeeded to that office for it seems that for the purposes of the present appeal it may be conceded that they were rightful holders of the office, and yet there is nothing to show that they proposed to succeed to the office, not through some appointment or nomination, but as of right. Even if it were assumed that they purported to succeed by

1. (1889) I. L. R. 13 B. 555 at 562.

right of inheritance there is nothing from which a rule of succession can be deduced sufficiently precise or definite for presuming that such a rule was contained in the waqfnama or the terms of the dedication. Unless all these facts are alleged and proved I am unable to see how the plaintiff can succeed in her claim, as it has been framed. These reasons for holding that the decision appealed from ought not to be disturbed seem to me to apply with greater force when it is borne in mind that we are sitting in second appeal and that it is not easy to class some of the questions to which I have alluded as questions purely of law.

I am therefore of opinion that the appeal should be dismissed with costs.

Sadasiva Aiyar J.—I entirely agree, and I shall only add that a claim to succeed by hereditary right to a trustee's office or to a religious office or to any other office should be looked upon with strong disfavour by Courts, whether the office was created by a Hindu or a Mahomedan or an adherent of any other creed. The holding of any office should depend upon necessary qualifications, and, while heredity might raise a feeble presumption of fitness to be considered by Court in arriving at a decision on the question of the successorship to the office, it should not be raised the dignity of a principle which creates a right of succession to any office, unless the terms of the original foundation of the office constrain the courts to treat heredity as the factor to be considered in deciding on the right to the office or unless there has been such a precise and uniform course of descent (by heredity almost irrespective of any consideration as to the person or post filled for the office) as to raise an irresistable inference as to the intention of the original creator of the office.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

Present:—Lords Shaw and Moulton, Sir John Edge and Mr. Ameer Ali.

Kali Baksh Singh and others — *Appellants.* *

v.

Ram Gopal Singh and others — *Respondents.*

Kali Baksh Singh. *v.* Ram Gopal Singh.

Deed of gift—Pardanashin lady—Burden of proof of execution—Independent advice—Undue influence—Rules in favour of pardanashins are protections given by law and are not to work as disability.

Where a Hindu lady had made a gift of one-half of the properties absolutely vested in her to the son of her paramour whom she treated with affection from his very boyhood, in a suit which was subsequently brought to set aside the aforesaid deed of gift on the ground that the executant was a pardanashin lady and had no independent advice:

Held, that the deed was duly executed, that she had the proper legal capacity to execute it, that it was read over to her and explained, that no undue influence over her was proved, and that as she was a woman gifted with strength of will and business capacity and the deed in question was not under the circumstances of her life in any way an unnatural disposition of her property the deed must be held to be an expression of her deliberate mind, rendering independent advice wholly unnecessary.

Held, further that although in case of a deed of gift executed by a pardanashin lady those who relied upon the deed had to prove affirmatively and conclusively that "the deed was not on[illegible] executed by, but was [illegible]ned to, and was really understood by" and "was not signed under du[illegible] b[illegible] arose from the free and independent will of the grantor," these provisions were a legal protection extended to her and could not be transmuted into a legal disability.

Held further that to sustain an allegation of undue influence the facts must fall under the general and useful category of the principle which in the language of Lord Kingsdown in *Smith* v. *Kay*[1] "applies to every case where influence is acquired and abused, where confidence is reposed and betrayed."

Mirza Sajjad Hossain v. *Nawab Wazir Ali and others*[3] and *Mohammed, Bakhsh Khan* v. *Hossein Bibi*[2] *approved and distinguished.*

Appeal from a Judgment and Decree of the Court of the Judicial Commissioner, dated May 21, 1908, reversing a Judgment and Decree of the Subordinate Judge of Rae Bareli, dated February 15th, 1907.

The facts material to the case are sufficiently set forth in the Judgment of their Lordships.

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1 (1859) 7, H. L. cases 750.

2. (1912) I. L. R. 34 A. 455 (P. C.) 3. (1888) I. L. R. 15 C. 684 (P. C.)

*27 th November 1913.

Kali Baksh Singh v. Ram Gopal Singh

De Gruyther K.C. (with him *Dube*) for the appellants contended that the deed of gift was executed by the lady who was a good business woman and able to read and write. She brought up the donee as her own child. He was the legitimate son of her paramour. She signed it as did the Patwari and other witnesses including the family priest. The Sub-Registrar recorded what occurred when the deed was produced before him at her residence. There was no proof that the father of the boy in any way influenced her. She required no independent advice as she was well able to understand the nature of her own act. The deed was an expression of her deliberate mind. The property in question formed only one-half of her estate. From this as well as from other circumstances of the case, it was only natural for her to have executed the deed.

Reference was made to *Mirza Sajjad Hossain* v. *Nawab Wazir Ali and others*[1], *Mahomed Bakhsh* v. *Hosaini Bibi*[2] and *In re Coomber*[3].

Sir Erle Richards K. C. and *Ross K. C.* on behalf of the respondents contended that the deed of gift was invalid and could not stand. The executant was not proved to have had independent advice or to have understood the transaction, the gift was made in favour of the son of her paramour who was her mukhtar. The property was ostensibly for the father who must have influenced her.

Reference was made to *Mirza Sajjad Hossain* v. *Nawab Wazir Ali*[1] *Mohamed Bakhsh* v. *Hoseini Bibi*[2] *Allcard* v. *Skinner*[4] and *Kanai Lal* v. *Kamini Debi*[5].

De Gruyther replied and referred to *Hakim Ikramuddin* v. *Najiban*[6].

The judgment was delivered by

Lord Shaw:—This is an Appeal from a Judgment and Decree of date the 21st May 1908, of the Court of the Judicial Commissioner of Oudh, which reversed a Judgment and Decree of the Subordinate Judge of Rae Bareli, dated the 15th February 1907.

The Plaintiffs ask that a Decree for actual and proprietary possession of certain shares in villages in Pargana Salon be passed in their favour against the Defendants, and for an account of mesne profits.

1. (1912) I. L. R 34 A. 455, (P. C.)
2. (1888) I. L. R. 15 C. 684 (P. C.)
3. (1911) 1. Ch. D. 723
4. (1887) 36 Ch. D. 145
5. (1867) 1. B.L.R. O. C. J. 31 note
6. (1898) L. R. 25 I. A. 187

Kali Bakshi Singh v. Ram Gopal Singh

It is unnecessary to enter upon many details of the case. The portion of it which was laid before the Board consists in a demand for cancellation of a deed of gift dated the 24th September 1903, executed by one Balraj Kuar in favour of Ganga Bakhsh Singh, son of the Appellant, Kali Bakhsh Singh.

This deed has been upheld by the Subordinate Judge, and has been declared invalid by the Court of the Judicial Commissioner.

It is important to observe what were the grounds for the cancellation of this deed. They are gathered together in the issues framed by the Subordinate Judge, and are as follows :—

(1) Did the lady execute the deed of gift?

(2) Was it written and completed without her knowledge? Was she able to understand the transaction?

(3) Was she of unsound mind at the time of the writing of the said deed?

The relation of the parties to the deed was, briefly stated, thus: —Balraj Kuar, who died two months after the execution of the deed of gift, was a *purdanashin* lady. She was possessed of a number of villages, or rather of shares therein, and she had become absolute owner thereof as the result of gifts made by one Bishunath Singh. At least six deeds of gift are produced, and there can be little doubt that the lady thoroughly understood this form of transaction. Her husband had died many years before, namely, in 1881, and her property was managed by Kali Bakhsh Singh, who was her *mukhtear*, and with whom she formed an intimacy the result of which was the birth of two illegitimate daughters. One of these was alive at the date of the deed.

Ganga Bakhsh Singh was the legitimate son of Kali Bakhsh Singh, and the suggestion seems to be warranted which points not only to the affection which Balraj Kuar had for Kali Bakhsh, but to the attachment which she had formed to the boy. The interests represented by the Plaintiffs are derived from remote relationship to Brij Mohan Singh, the deceased husband, and to Bishunath Singh, the father-in-law, of the lady.

Upon the issues as framed and the contentions of parties as pleaded, the Subordinate Judge, who manifestly conducted the case with great care, had no doubt. As to the Plaintiffs' evidence he holds that it " is absolutely unreliable " and seems to me a pure concoction." Reasons are given for this opinion, and the judgment upon this part of the case does not seem to be controverted in the Court of the Judicial Commissioner. In short, the attack upon the deed by the evidence let by the Plaintiffs has failed.

Kali Baksh Singh v Ram Gopal Singh

As to the evidence tendered in support of it the matter stands thus: *Ex facie* it is duly signed and attested. It bears the signature of Balraj Kuar, of the Patwari, Lachman Pershad, and of three other witnesses, including the family priest. Above all there is the certificate of Bunyad Husain, the Sub-Registrar of Salon, as to what occurred when the deed was produced by Balraj Kuar before him at her residence. It is duly registered. There seems no reason to doubt the value of his testimony, which is believed in its entirety by the Subordinate Judge. Apart from the circumstances to be now mentioned the deed appears to be beyond suspicion, being attested by just those persons who would be naturally called in for such a purpose and being registered in the usual way by the proper officer.

Their Lordships incline to the opinion that the judgment of the Subordinate Judge would not have been reversed but for the controlling weight which was attached by the Court of the Judicial Commissioner to the fact that the lady in the transaction had not independent advice. The view, put briefly, adopted in that Court is this: The deed was executed in favour of the son of a paramour and therefore, to all intents and purposes, in favour of the paramour himself, he also being a person who was her *mukhtear*. Although there is no direct evidence that he ever influenced her to make a gift in favour of his son, still, in the circumstances the deed (so it is maintained) must fall, because the law makes an absolute demand that a person in such a situation should have independent advice. The absence of this element entitles a Court of Law to set the deed aside.

There are several circumstances which favour this conclusion. In the first place, the lady was a *pardanashin* lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the Deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset. [It] was expressly re-affirmed by this Board in the case of *Sajjad Hu[sain] v. Nawab Wazir Ali*[1] and nothing that is now said can, or is inten[ded] to, disturb it.

1, (1912) I. L. R. 34 A, 455. (P. C.)

In the next place, a fact which has given rise in their Lordships' minds to considerable difficulty, has been that Kali Bakhsh, the father of the donee and the *mukhtear* of the donor was not examined as a witness. Kali Baksh Singh v Ram Gopal Singh

This brief review is given by way of indication that the judgment now to be announced has been arrived at after a full balancing of the considerations both in fact and in law which affect the question to be determined.

The property conveyed by the deed of gift amounted, as the Board were informed, to about one-half of the lady's estate. It was not contended that her outward style or mode of life had thereby been changed, or that any impoverishment had occurred, the case being thus distinguished from those of donations of practically the entire property of the donor, of which the case of *Sajjad Husain* above referred to was an instance.

There Lordships are satisfied on the salient features of the case as follows :—

1. As to the execution of the deed. The challenge of this has failed, and both the Courts below hold the execution to be properly and satisfactorily established.

2. As to the capacity of the grantor. Upon this subject the Courts below are also agreed in holding that competency is proved. In their Lordships' judgment, this is so, as aftermentioned, in a special degree.

3. As to the deed being read over and explained. Again both Courts are agreed. But while the Subordinate Judge thinks that the explanation was thorough, the Judicial Commissioners appear to incline to the view that it was perfunctory. Upon this matter much depends upon whether the grantor of the deed was a person accustomed to business or to the management of affairs. It is upon this point that their Lordships find themselves in agreement with the Subordinate Judge. In doing so they found upon what is admitted not only by him, but by the Court of the Judicial Commissioner. It appears that the lady had been in the habit for a considerable period of years of managing her affairs, of entering up her accounts, and of attending to business. Upon another part of the case it rather appears from the judgment of the Judicial Commissioner, Mr. Chamier, that the lady had much strength of will, and that her father-in-law, Bishunath Singh " used to obey Balraj Kuar more than the latter obeyed him " while with reference to the issue now under discussion, the same Judicial Commissioner says, " It is proved by evidence adduced by the Plaintiffs that Balraj Kuar

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signed her own accounts and looked after her own affairs." Their Lordships in short, do not entertain much doubt that this pardanashin lady was a capable woman, fully alive to the direction of her own interests, and well aware of what she was doing.

4. As to undue influence. Nothing of this kind is proved affirmatively and the inference upon the subject must depend to a considerable extent upon the view which is taken as to the capacity of the grantor of the deed. The suggestion that Kali Bakhsh prompted a gift in favour of his son does not seem to rest upon anything. more than that he was *mukhtear* or held a power of attorney in regard to the management of her property. It is regrettable that the matter was left thus in the region of conjecture. There is no evidence of any kind that the *mukhtear* either mismanaged or overmanaged anything committed to his charge, or that in any particular regarding her affairs he withstood the lady or controlled her purposes. It is accordingly necessary to consider whether the facts of this case fall under the general and useful category of the principle which; in the language of *Lord Kingsdown* in *Smith* v. *Kay*[1] " applies to every case where influence is acquired and abused, where confidence is reposed and betrayed." Their Lordships do not find themselves able to affirm that such abuse or betrayal occurred. It is no doubt true that the evidence in such a case would not require to have been very strong, but there is no evidence at all which would lead to the conclusion.

As stated, their Lordships incline to think that the Judgment of the Subordinate Judge would have been affirmed by the Judicial Commissioners but for the view thus expressed:—" It is needless to cite authorities to show that "such a gift cannot stand unless it is proved that the lady had independent advice."

In their Lordships' opinion there is no rule of law of the absolute kind here indicated. The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction. If she did, the issue is solved and the transaction is upheld; but if upon a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to

1. (1859) 7 H. L. Cases 750

stand. The present, in their Lordships' judgment, appears to be a case of that kind. Kali Baksh Singh v. Ram Gopal Singh

Their Lordships, as already mentioned, have fully in view the fact that the lady was a *pardanashin* lady, but the evidence as to her strength of will and business capacity, and the fact that the deed as granted is not in the circumstances of her life in any way an unnatural disposition of part of her property, go far, taken together with the evidence in this case, to convince them that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it. In short their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a *pardanashin* lady, they cannot transmute such a legal protection into a legal disability. She might, especially if the outside adviser had been a lawyer, have altered the shape or form of the transaction, but in substance and result she would have carried out the same purpose and will as are expressed by the deed under challenge. They refer to the Judgment of *Lord Macnaghten* in *Mahomed Bukhsh Khan* v. *Hosseini Bibi.*[1]

In these circumstances their Lordships will humbly advise His Majesty that the Judgment and the Decree appealed from should be reversed and that of the Subordinate Judge of date the 15th February 1907 should be restored. The Appellants will be entitled to the costs since the date of the last-mentioned Judgment and to the costs of this Appeal.

Solicitors for appellants :—*Barrow, Rogers and Neville.*

Solicitors for respondents :—*T. L. Wilson and Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Tyabji.

A. R. Iswaram Pillai — *Appellant** *(Plaintiff)*

v.

S. Taregan and others — *Respondents* *(Defendants).*

Hypothecation—Sum kept with mortgagee to be paid to a third person—The right of such third party to sue the mortgagee for money so reserved.

One S executed a hypothecation bond in favour of defendants and kept a portion of the amount with defendants " in order to be paid to and get a receipt Iswaram Pillai v. Taregan

1. (1888) I. L. R. 15 C. 684 P.C.

* S. A. No. 998 of 1912. 13th November 1913.

from plaintiff on account of balance due to him for purchase of yarn." Plaintiff who was not a party to the contract sued to recover the amount. Courts below dismissed the suit on the ground that there was no privity of contract.

Held that the proper person to sue was the promisee and that plaintiff being a stranger to the contract though entitled to a benefit under it was not entitled to sue.

Second appeal against the decree of the District Court of Tinnevelly in A. S. No. 406 of 1911, perferred against the Decree of the Court of the District Munsiff of Ambasamudram in O. S. No. 582 of 1910.

B. Narasimha Rao for *T. M. Krishnaswami Aiyar* for appellant.

S. Ramaswami Aiyar for respondent.

B. Narasimha Rao:—T' Lower Courts were wrong in holding that the plaintiff is not entitled to maintain the suit on the ground of want of privity between him and the defendants. The plaintiff is entitled to sue on general principles of justice, equity and good conscience. The rule that third parties cannot sue on a contract is not an inflexible rule and several exceptions to it have been recognised in Indian Courts. Persons who are intended to be benefitted by a contract are entitled to sue on it though they are not formal parties to it. It is a sort of trust founded on contract. The stricter rule of English Law based on technicalities of English procedure has not been followed here.

The First Indian case recognising the exception is *Khwaja Muhammad Khan* v. *Husaini Begam*[1], It has been followed in *Shuppu Ammal* v. *Subramanian*[2] *Arumuga Goundan* v. *Chinnammal*[3] *Rajagopala Raju* v. *Datle Rashayya*[4] *Rukmabai* v. *Govind Moreshwar*[5] *Pratab Narain Mukerjee* v *Sarat Kumar Debi*[6]. Reliance was also placed on the observations of *Sadasiva Aiyar*, J. in his referring judgment in *Balamba* v. *Krishnaya*[7]. The latest and the strongest case is the Judgment of *Jenkins, C. J.* and *Mookerjee J.* in *Debnarain* v. *Ramsadhan*[8]. It is impossible to distinguish that case from the present. The circumstances referred to by their Lordships as "material to remember" in that case, it is true, are not found here. But they are not essential and are referred to only as showing that the fund has been earmarked for paying the plaintiff. In this case such an intention is made manifest by the very language of the mortgage deed Ex. E.

1. (1910) I. L. R. 32 A. 410 (P. C)
2. (1909) I. L. R. 33 M. 230
3. (1911) 21 M. L. J. 918
4. (1911) 22 M. L. J. 169
5. (1904) 6 Bom. L. R. 421
6. (1900) 5 C. W. N. 386
7. (1913) 25 M. L. J. 65
8. (1913) 17 C. W. N. 1143

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This aspect of the matter was never considered in the Courts below. *Gregory* v. *Williams* [1] shows that even in England the rule is sometimes relaxed. The comments of *Jessel*, M. R. in *In re Empress Engineering Co.*,[2] on the decision in *Gregory* v. *Williams*[1], are very instructive. *Balamba* v. *Krishnayya*[3] *Debi Narain* v. *Ramsudhan*[4] has been followed in C. M. A. No. 51 of 1912 by *Sadasiva Aiyar* J. Reference was made to the statement of the Law in Halsbury's Laws of England Volume VII, page 344, and Cyc. of American Law and Procedure, Volume IX.

Secondly, that in any event there is a declaration of trust in favour of the plaintiff, Ss. 5 and 6 of the Trust Act apply, The mortgagor is the trustee and the defendants the Mortgagees the trustees. The plaintiff is the beneficiary ;and the fund of Rs. 450 kept in deposit is the subject matter of the trust. There can be no doubt that he was intended to be benefitted by the trust.

And lastly, The defendants were constituted agents of the mortgagor for the purpose of paying off the plaintiff and they are bound to pay him. Bowsted on Agency 5th Edn. page 426,

S. *Ramaswami Aiyar*, The cases relied on by the other side viz. *Khwaja Muhammad Khan* v. *Husaini Begam*[5], *Suppu Ammal* v. *Subramanian*[6], *Arumuga Goundan* v. *Chinnammal*[7] *Rajagopala Raju* v. *Radhayya*[8] and *Rukmabai* v. *Govind Morsewar*[8] are cases of family settlements in which the parties are all related to each other. Even those cases recognise the general rule that a third party cannot sue. S. 37 of the Indian Contract Act enacts the rule. To this rule trusts are an exception. But in this case there is no question of trust since the direction to the mortgagee to pay plaintiff could be revoked by the mortgagor. *Siva Subramania Mudaliar* v. *Gnana Sambanda Pandara Sannidhi*[9] *Raghunatha Chariar* v. *Sadagopachariar*[10]. In a much stronger case of a husband in insuring a policy for the benefit of his wife this Court has held that no trust arises. See *Balamba* v. *Krishnayya*[11] and the observations of the Chief Justice. Also referred to *Oriental Government Security Life Insurance Co.* v. *Vanteddu Ammi Raju*[12] *Cleaner* v. *Mutual Reserve Fund Life Association*[13]. *Khawaja Muhammad Khan* v. *Husaini Beg*[illegible]duces no new doctrine.

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See S. 23 Cl. (c) of the Specific Relief Act. As to whether a trust will arise, see *Khawaja Muhammad Khan* v. *Husaini Begam*[1] *In re Empress Engineering Co.*,[2] *Gandy* v. *Gandy*[3] *In re Rotherham Alum & Chemical Co.*,[4] and even if by a fiction the consideration money could be assumed to have been retransferred by mortgagor to mortgagee for payment to a third party no obligation to latter can arise. *Williams* v. *Everett*[5] *Gregory* v. *Williams*[6] and *Touche* v. *Metropolitan Railway Warehousing Co.*[7] are quite a different classes of cases. See Pollock on Contracts p. 206. Shephard on Contract Act Notes to S. 37. In *Deb Narain* v. *Ram Sadhan*[8] there was an independent contract between vendor and a third party and none of the circumstances relied on are present here. S. 6 Trust Act will not apply. The fact is for whose benefit is the transaction intended and whether the covenant is recoverable.

B. Narasimha Rao replied. whether plaintiff should be allowed to sue or not is really a matter of procedure and not of substance. If his right is negatived, the result will be that he will have to proceed against the mortgagor and there will be a multiplicity of suits. The mere fact that a direction to payment be revoked will not make it any the less a trust if the other conditions are satisfied. S. 78 of the Trust Act is important in this respect. It shows that there may be revocable trusts which stands good till revoked. The English Cases do not help us for admittedly the English Law is much stricter than ours.

The Court delivered the following

Judgment:—*Tyabji* J.—The plaintiff sues for a decree for a sum of Rs. 610 which includes the principal sum of Rs. 450 and interest. This sum is claimed as due on a hypothecation bond purporting to be executed on the 27th August 1907 to which the plaintiff was not a party, but which was executed by one sahib Shaik Uduman Tharagan in favour of the 1st and 2nd defendants and of the father of the 3rd and 4th defendants, whom I shall refer for brevity as the defendants. Sheik Uduman Tharagan the executant of that bond was a debtor of the plaintiff and he asked the defendants (in terms to which I shall immediately refer) to pay off the sum of Rs. 450 which was due from Sheik Uduman Tharagan himself to the plaintiff.

The material portions of the hypothecation bond are as follows:—" The Hypothecation bond executed on the 27th August 1907 to " the defendants..............." the sum received on the hypothecation to you of the following properties belonging to me ....", then the particulars of the Rs. 2000 are given which includes the following item " a sum of Rs. 450 is kept with you in order to be paid to and get a receipt from "...........the plaintiff" on account of the balance due to him in respect of the purchase of yarn."

It will thus be seen that the plaintiff claims to have a contract enforced to which he was not a party but which was entered into between his debtor and the defendants.

The defence is First, that the plaintiff being a stranger to the contract could not sue on it; and secondly that, though the consideration for the hypothecation bond was originally fixed at Rs. 2000, (including the payment of the sum now in question), yet that that agreement was modified by a notice given by the defendant's Vakil 20 days after the date of the hypothecation bond; and that subsequent to that notice even as between the said Sheik Uduman and the defendants there was no contract that the defendants should pay the said sum to the plaintiff and that, the charge created by the hypothecation in favour of the defendants was effective only in so far as the consideration had actually passed between the parties thereto at the date of the said notice viz., for Rs. 1250. The endorsement of the hypothecation bond and a decree Exhibit 4 which refers to it or relied upon as evidence of this modification of the terms of the hypothecation bond.

Both the lower courts have dismissed the suit and the learned District Judge in doing so said, " the only question argued is whether there was privity of contract between the plaintiff" and he defendants.

It was argued before us that the plaintiff was entitled to sue on the contract notwithstanding that he was not a party to it——and mainly on two grounds. The first argument was that by the terms of the hypothecation bond it was agreed that a trust should be created in favour of the plaintiff and that if this was so the plaintiff could enforce the agreement. In the second place it was argued that the general rule of law that a person who is not a party to a contract cannot become entitled by that contract to demand the performance of any duty under it was not more applicable in India after the decision of the Privy

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Council in *Khwaja Mahomed Khan* v. *Husaini Begam*[1] especially as that decision is explained and applied in *Debnarain Dutt* v. *Ramasadhan Mundal*[2] a decision of *Sir Lawrence Jenkins* C.J. and *Sir Ashutosh Mukerjee* J. of the Calcutta High Court. It seems to me however that what were put forward as two distinct heads of arguments were in the circumstances of the present case indistinguishable and that both depend upon the consideration of the same question. For it is admitted that if the terms of the hypothecation deed are given effect to in their entirety, the plaintiff would receive the money from the defendants. The consideration of the question whether the plaintiff is entitled to have the terms of the hypothecation deed enforced is not, it appears to me materially advanced by the determining whether, if they were enforced, the money would be payable to the plaintiff through a trust or otherwise, or, to use the terms of the Trusts Act by determining whether the defendants agreed to annex to their ownership of the money the obligation of paying it to the plaintiff or he merely agreed to pay it to the plaintiff. Assuming that the money would be payable through a trust, the question would still remain whether the plaintiff can require that the trust should be completed. Assuming in other words, that when the defendants agreed to pay to the plaintiff the sum claimed, they agreed to become the trustees of the plaintiff, the question still remains whether that agreement can be enforced by the plaintiff. Every trust requires at its creation an agreement between the trustee and the author of the trust (See S. 10 Trusts Act.) It is true that such an agreement is not always expressed, but is often implied and in the case of constructive trusts it may be imposed upon a person against his will. Here it is evident that it is sought to be imposed against the will of the alleged trustee. It is necessary to mention that in the present case the trust can be imposed only if the agreement is enforced at the instance of the plaintiff, for here there is no property transferred to the defendants of which they agreed to become trustees, but all they agreed to do was at the most to allocate a certain sum in their own hands and to make that sum the trust fund. The principle of constructive trust can have no bearing on this point for it cannot be contended that if A agrees with B to become a trustee for C, the mere agreement between A and B even if B afterwards repudiates it, (and if A consents to such repudiation) will make B a constructive trustee for C. An agreement to become a trustee is not for the purposes of the present case and in respect of its enforceability distinguishable from an agreement to pay a sum of

1 (1910) I. L. R. 32 A. 410 2. (1913) 17 C. W. N. 143

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money. In such cases the trust can arise only after the contract has been performed; until the trust arises it is merely a contract to create a trust and so long as the trust is not complete it is what in another connection is called an executory trust as distinguished from an executed trust; and until the trust is executed there will be no trustee but only some person possibly " in progress towards being a trustee " (in the words used by Sir Thomas Plumer in *Wall* v. *Bright*[1]. Even after he has completed his progress of being a trustee he may occupy a position such as the vendor in *Shaw* v. *Foster*[2] was held to occupy. That position is thus described by Earl Cairns, " the trustee was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property a right to protect that interest and an active right to assert that interest if anything should be done in derogation of it. The relation therefore of trustee and *cestui qui trust* subsisted but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." (p. 338.)

The present case for these reasons seems to me to be quite different from others where a trust has already been created and the beneficiary seeks to enforce it.

I come therefore to consider whether the agreement referred to can be enforced at the instance of the plaintiff. In the decision of the Privy Council in *Khwaja Mahamad Khan* v. *Huseini Begam*[3] the parents of a bride and bridegroom (who were both minors) entered into an agreement which the bride sought to enforce by suit. The marriage was recited as the cause leading up to the agreement. Their Lordships allowed the suit on the following grounds." (1) that *Tweddle* v. *Atkinson*[4] was an action of assumpsit and that the rule of common law on the basis of which it was dismissed was not applicable to the facts and circumstances " of the case. They state, apparently, as the reasons why *Tweddle* v. *Atkinson*[4] did not apply, (2) that the agreement executed by the defendant specifically charged immoveable property for the allowance which he bound himself to pay to the plaintiff; (3) that the plaintiff was the only person beneficially interested under it,' and from this they draw the conclusion; (4) that "although no party to the document, she was clearly entitled to proceed in equity to enforce her claim." After this they remark (5) " in India

1. (1820) 37 Eng. Rep. 456 S. C. 1. Jac. and W. 494 at p. 503.
2. (1872) L. L. 5 H. L. 321.
3. (1910) I. L. R. 32 A 410.
4. (1861) 121 E. R. 762; 1.B. and S 393.

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and among communities circumstanced as the Muhammadans among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine were applied to agreements or agreements entered into in connection with such contracts." Their Lordships do not refer to S. 23 of the Specific Relief Act which provides that " where a contract is a settlement on marriage—any person beneficially entitled thereunder " may obtain specific performance of the contract.

It seems to me that none of the circumstances on which their Lordships based their decision are present in the case now before us.

The facts in *Debnarayan* v. *Ramsadhan*[1] are somewhat similar to the facts of the case with which we are dealing ; but there were present in that case certain very material circumstances which are not present here ; (1) all the parties to the contract sued upon were on the record ; (2) the contract was communicated to the plaintiff and he accepted the arrangement ; (3) in consideration of such acceptance the plaintiff handed over a patta which had been deposited with him under the impression that by so depositing it a charge was created on the property in his favour ; (4) by the agreement sued upon the plaintiffs debtors had parted with the whole of their property in moveable and immoveable to the 5th defendant ; (5) the sum sued for " was allocated and held by defendant No. 5 for the benefit of the plaintiff so that in a sense the money was re-ified and ear marked for this purpose." *Sir Lawrence Jenkins* with reference to these facts states " we have here then a position in which it would be in accordance with the principles of justice equity and good conscience, the abiding rule in these Courts, that the plaintiff should be entitled to enforce this claim against defendant, No. 5." Then he states that *Tweddle* v. *Atkinson*[2]. does not bind the Indian Courts because (1) that decision was on a form of action peculiar to the common law courts in England and was influenced by the fact that no action in assumpsit could be maintained upon a promise unless the consideration moved from the party to whom it was made," whereas under the Indian Contract Act. Sec. 2 (d) " we have a definition of consideration, which is wider than the requirement of English law (2) Sir Lawrence Jenkin's second reason is stated in the following terms. " We have now ample authority for saying that the administration of justice in these courts is not to be in any way hampered by the doctrine laid down in *Tweddle* v, *Atkinson*[2] that I take to be the result of the decision of the Privy Council in a recent case which is reported in *Kwaja*

1. (1913) 17 C. W. N. 1143 2. (1861) 121 E. R. 762, 1 B. and S. 393.

Muhamad Khan v. *Husaini Begam*[1]. In the report of that case in the Calcutta Weekly Notes there is an interlocutary remark of *Lord Macnaghton* which indicates the limits imposed on a Court of Common law. There he says, ' Supposing (that is the plaintiff) were an English woman it is true she could not bring an action in the King's Bench Division, but could she not bring a suit in equity? The answer of the learned Counsel was ' yes '. The bar then in the way of an action by the person not a direct party to the contract was probably one of procedure and not of substance. In India we are free from the seand are guided in matters of procedure by the rule of justice equity and good conscience." (3) After that *Sir L. Jenkins* refers to three cases *Gregory* v. *Williams*[2]; *Touche* v. *Metropolitan Railway Warehousing Company*[3] and *Gandy* v. *Gandy*[4]. And finally he concludes by saying "there is a valuable exposition of the law by *Lord Hatherley*—' The case comes within the authority that where a sum is payable by A. B. for the benefit of C.D. C.D. can claim under the contract as if it had been made with himself. " That appears to me to be a principle which is of distinct use in the consideration of this case."

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It was argued before us, mainly on the authority of the ruling to which I have just referred that the doctrine that a stranger to a contract cannot sue on it was no more applicable in India. With reference to this contention it is necessary to consider some of the remarks in the decision. It must be observed that the statement of Lord Hatherley in *Touche* v. *Metropolitan Railway Warehousing Company*[3] cited by *Sir Lawrence Jenkins*, cannot be said to have been accepted by the Courts of Equity in England as a sufficient exposition of the law, See per *Lord Bowen* in *Gandy* v. *Gandy*[4], Sir Frederick Pollock refers to it (Contracts 6th Ed.p. 202)as having been overruled by the Court of Appeal in England and he cites *In re Rotherham Alum and Chemical Co.*[5] Lord Justice *Lindley* says in that case, " An agreement between A and B that B shall pay C, gives C no right of action against B. I cannot say that there is in such a case any difference between equity and common law. It is a mere question of contract. It is said that Mr. Peace has no equity against the Company because the Company had the benefit of his labour. What does that mean? If I order a coat and receive it, I get the benefit of the labour of the cloth manufacturer; but does any one dream that I am under any liability to him? It is

1. (1910) 14 C.W. N. 865 s.c. 32 A. 410. 2 (1817) 3 Mr. 582 s. c. 36 E. R 224.
3. (1871) L. R. 6 Ch. Ap. 671 4. (1884) 30 Ch. D. 67.
5 (1883) 25 Ch. D. 103 at p. 111

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mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work." See also *In re Empress Engineering Company*[1] per *Jessel M. R.*, in the course of the arguments and Lindley on Companies p. 148 cited by Pollock Op. Cit.

Sir George Jessel says in the case last cited "I know of no case, where, when A simply contracts with B to pay money to C, C has been held entitled to sue A in equity." These decisions also show that this doctrine is not one merely based on the technicalities of common law procedure in England, but that it finds a place in the equitable principles which *Sir George Jessel* M. R. and other eminent exponents of equity were not reluctant to enforce. This agreement between the rule of Common law and equity is brought out also in the remarks of *Brett* L. J. in *Wilson* v. *Lordbury*[2] while the point where equity and Common law differ is indicated by *Cotton* L. J. in *Gandy* v. *Gandy*[3] and by *Bowen* L. J. *ib.* p. 69-70. The latter points out of that if the true intent and effect of of a contract is to give to third parties a beneficial right under it, that is to say, to give them a right to have the covenants in the contract, performed—and this can only happen, (as pointed out by Sir *George Jessel* in *In re Empress Engineering Co.*,[4] when the parties have no power to coming to a new agreement the next day, releasing the old one'—then the stranger may be allowed in a Court of Equity to enforce his rights under the contract: but that the whole application of this doctrine depends upon its being made out that upon the true construction of the contract such a beneficial right is given. *Cotton* L. J. says :—" Now of course as a general rule, a contract cannot be enforced except by a party to the contract ; and either of the two contracting together can sue the other if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person-a person who is not a party to the contract—cannot do so. That rule however is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui qui trust* under that contract, then B would, in a Court of Equity, be allowed to insist upon and enforce the contract."[4] The distinction between Courts of Equity aud Common Law does not exist in India. But the exception referred to by *Cotton* L. J. necessarily presupposes that the trust has already been created,

1. (1880) 16 Ch. D. 126, 127. 2. (1880) 5 Q. B. D. 518 at pp. 526, 527
3. (1884) 30 Ch. D. 57 at pp 57, 73. 74.
4. (1913) 16 I. L. J. 669, 17. C. W. N. 1142.

that the progress towards being a trustee has been completed, as I have already pointed out.

It would therefore appear that some of *Sir Lawrence Jenkin's* remarks in *Debnarin's case*[1] might be misleading if they are not read in connection with the facts of the particular case.

In connection with the law as enforced by the Courts of equity in England it may be well to refer to *In re Empress Engineering Co.*,[2] which contains the following comment by *James* L. J. on *Gregory* v. *Williams*[3] most nearly approaching to the contention put forward on behalf of the appellant. "In *Gregory* v. *Williams*[3] the man with whom the contract was made was one of the plaintiffs, and the only defence there, would have been misjoinder of plaintiffs, and that is a defence which the Court was not likely to view with much favour." In *Debnarain's case*[1] the original promisee was not a plaintiff but he was one of the parties to the suit.

The result may therefore be shortly stated that no case had been cited to us in which, unless the contract has been partly or fully performed, so that a trust has been already created, a suit on a contract has, under circumstances similar to those with which we have to deal, been allowed to be maintained without the presence on the record of all the parties to the contract, and no English case has been cited in which one of such parties is not a plaintiff.

It has been pressed upon us however that we are not bound necessarily to follow the law as laid down by the English courts; that in the absence of legislative provisions the law of our courts is that indicated by justice, equity and good conscience. One of the circumstances owing to which it has been suggested that the rule that ought to be followed by us must be different from that which prevails in England is that the definition of consideration contained in the Indian Contract Act, Sec. 2 (d) does not require that consideration should necessarily move from the party seeking to enforce the contract. This circumstance may not be so relevant to the point under consideration as might at first appear; for the definition of 'consideration' in the Indian Contract Act, has direct reference in its very terms to the parties to the contract who are referred to in the Act as the promisor and promisee. The effect of Sec. 2 (d) is that if a promisee wishes to have the contract enforced, his promiso cannot object that the consideration proceeded from a third

1. (1913) 17 C. W. N. 1143. 2. (1880) 16 Ch. D. 125. 130.
3. (1817) 3 Mer. 582. 36 E. R. 224.

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party, and not from the promisee seeking to enforce the contract. It does not seem to me to be equally clear that the definition can affect the question whether a third party (who is neither the Promisor nor the Promisee) can enforce the contract. If A and B agree that in consideration of X paying to B Rs. 100, B will repair A's house, it is true that A can enforce the contract against B, who cannot object that he received the money from X and not from A (though if X does not pay, there may be a failure of consideration and B may be entitled to rescind the contract on that account). On this point the English Law does not seem to be different ; *Davan-Port* v. *Bishopp*[1] *Gandy* v. *Gandy*[2]. But is the definition of any assistance in considering whether X can sue on a contract by which A promises B that A will pay to X Rs. 100 ? The definition refers to the third party (X) as the person from whom the consideration moves; not as the person (being neither the promisor nor the promisee) for whose benefit the contract is made. The definition can therefore have only a remote bearing on the totally distinct question whether a person who benefits by a contract but who is not the promisee can sue on the contract.

Finally it has been contended that the rule against a stranger to a contract being allowed to sue is one merely of procedure and that we should not hesitate to disregard it in order to do justice. It is indeed described as a rule of procedure by *Willes* J. in *Gray* v. *Pearson*[3] but in terms which are far from implying that therefore the rule is opposed to justice and should be disregarded. He says : " I am of opinion that this action cannot be maintained and for the simple reason, a reason not applicable to merely the procedure of this country but one affecting all sound procedure that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance, in the case of agents, auctioneers or factors those exceptions are in truth more apparent than real. "

It was pressed before us however that the Privy Council have definitely stated that *Tweddle* v. *Atkinson*[4] was not applicable to the facts and circumstances of the case before them,and that serious injustice might result if the common law doctrine had been applied thereto and this supplied, (in the words used in *Debnarain* v. *Ramsadhan*[5] " ample authority for saying that the administration of justice in these courts is not to be in any way hampered by the doctrine

1. (1843) 63 E. R. 201.
2. (1886) 30 Ch. D. 57.
3. (1870) L. R. 5 C. P. 568.
4. (1861) 121 E. R. 762.
5. (1913) 16 I. L. J. 669 at p. 674. s. c, 17 C. W. N. 1143.

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laid down in *Tweddle* v. *Atkinson*."[3] It seems to me with great respect that this argument is based on a misapprehension of the P. C. decision. Their Lordships only say that the common law doctrine did not apply to the facts and circumstances of the case before them but that doctrine would not, it seems to me, be applicable in England in a case where immovable property is specifically charged for the sole benefit of a third party in consideration of her marriage and where she is a minor whose natural guardian is a party to the contract and when the marriage has already taken place and everything done to complete the creation of the trust. Their Lordships of the Privy Council do not purport to go beyond what the Courts of Equity would have done in England, this is expressly stated by them. Assuming however that they intended to say that the law prevailing in England should not be applied in disregard of the circumstances in India and that would not be any new proposition it is necessary to bear in mind that in any case a person who is not a party to the contract cannot be permitted to enforce it without being subject to all the equities which would be present between the parties themselves, and this would almost invariably necessitate that all the parties to the contract should be impleaded in the suit the question whether the contract is revokable at the option of either of the parties or whether it has been altered by mutual consent or been performed in part, whether the parties can be restored to their original position and other similar questions would have to be considered and would affect the third party's claim. See *In re Empress Engineering Co*,[1] and the interlocutory remarks of *Jessel* M. R. during arguments ; and per *Grant* M. R. in *Gregory* v. *Williams*[2].

In all these respects the plaintiffs suit is defective.

I am therefore of opinion that the principle that the proper person to bring an action is the person whose right has been violated (See per *Willies* J. in *Gray* v. *Pearson*[3], a principle recognised both by common law and equity (See per Lord *Lindley Inre Rotherham Alum and Chemical Company*[4], applies in India also no less in England and that, except in cases, which are not material at present, the person who acquires a right to enforce a contract of such a nature as we have to deal with is the promisee and not a stranger to the contract, who may benefit under the contract, and that therefore the lower courts were right in dismissing the plaintiff's suit.

The appeal will be dismissed with costs.

Ayling J. I agree.

1, (1880) 16, Ch. D, 125, 128. 2, (1817) 3 Mer, 582 at, p. 589. s. c. 36 E.R 224
3, (1870) L., 5 C, P. 568 4. (1884) 25 Ch. D, 102. 111,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

Present :—Sir Charles Arnold White, Chief Justice Mr. Justice Sankaran Nair, and Mr. Justice Oldfield.

Peria Aiya Ambalam and another. } *Appellants.* (*2nd and 3rd defendants*).

v.

Shunmugasundaram and others. } *Respondents.* (*1st plaintiff and legal representatives of the 2nd Plaintiff.*)

Peria Aiya Ambalam *v.* Shunmugasundaram

Sadasiva Aiyar J.

Mortgagor and mortgagee—Dispossession of mortgagee in possession—Adverse possession—Against mortgagor—Notice of adverse title necessary.

Per Full Bench Where a trespasser takes possession dispossessing the mortgagee his possession may be adverse to the mortgagor but will not become so until the latter has notice of the adverse title set up by him.

Per Sadasiva Aiyar J. In a suit for declaration based on an alleged denial of title, limitation does not commence to run till the plaintiff has notice of the denial.

Ottapurakkal Thazath Soopi v. Cherichil Pallikal Uppathummal[1] dissented from.

Per Tyabji J.: *Quaere*, if a suit for declaration of title world be barred so long as the title is not extinguished ; *Rajah of Venkatagiri v. Iskapalli Subbiah*[2] doubted.

Second Appeal against the decree of the District Court of Ramnad at Madura in Appeal Suit No. 128 of 1911, preferred against the decree of the Court of the Temporary Subordinate Judge of Ramnad in Original Suit No. 70 of 1910.

C. V. Anantakrishna Aiyar for Appellants.

S. Muthiah Mudaliar for Respondents.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH.†

Sadasiva Aiyar J :—The defendants Nos. 2 and 3 (appellants) trespassed into the house mentioned in the plaint in 1898 and dispossessed the usufructuary mortgagee of the house, the equity of redemption vesting in the plaintiff and the mortgage term expiring only in 1917. This suit for declaration of the plaintiff's title to the house was brought in 1909 on the allegation that defendants Nos. 2 and 4 denied the plaintiff's title to the equity of redemption when the plaintiff remonstrated with them for constructing additional buildings upon the lands in 1908. One of the questions for decision is whether this declaratory suit is barred by limitation.

*S. A. No. 1973 of 1911 10th December 1913

1. (1909) I. L. R. 33 M. 31 2. (1902) I. L. R. 26 M. 410

† 5th August 1913.

Peria Aiya Ambalam v. Shunmugasundaram

Sadasiva Aiyar J.

The plaintiff bases his cause of action in 1908 when the defendants Nos. 2 and 3 denied his title and when he remonstrated with them, and he contents that he has six years from 1908 to bring his suit for declaration.

The defendants Nos. 2 and 3 contend that they have been in adverse possession of the house from 1898 to the plaintiff's knowledge, that they have been denying the plaintiff's title from 1898 and setting up title in themselves, and hence this declaratory suit, brought more than six years after 1898 and more than three years after the plaintiff attained majority, is barred.

That the period of limitation for a declaratory suit is six years under Article 120 of the Limitation Act (the period being calculated from the date when the right to sue accrues) is now settled, unless the case comes under the classes of suits praying for the special declarations provided for in Articles 92, 93, 119, 125 and 129 (that is, suits for declarations in respeet of forgeries of documents, adoptions, alienations by Hindu widows and maintenance, etc.)

Now declaratory suits might be of very various kinds and the question when the right to sue accrues in respect of a particular class of declaratory suits seems to be a question of great difficulty in many cases. Section 42 of the Specific Relief Act provides in general terms that any person entitled to *any* legal character or to any right to property may institute a suit against any person denying or interested to deny his title to such character or right and the Court may, in its discretion, make the needed declaration that he is so entitled. Now, if a suit can be instituted not only against the person denying but even against one merely interested to deny when does the right to-sue accrue for a suit brought against a person who is merely interested to deny? Is it as soon as the defendant becomes interested to deny or the plaintiff apprehends that he may actually deny? And if the cause of action arises only when the denial occurs, should that denial be by a formal act or can an oral denial made to a third person or a denial made in writing and not communicated to anybody give rise to a cause of action and will the plaintiff be barred after six years from such denial? Can the defendant be allowed to say that he wrote a denial in his closet and put it in a box without communicating it to any body and that six years from that date is the period for bringing the declaratory suit? Further, does each separate denial give rise to a separate cause of action? Of these questions, the case law has not been very consistent. In *Chukkan Lal Roy* v. *Lalit Mohan Roy*[1] it was held that a

1. (1893) I. L. R. 20 C. 906 at 925.

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suit for declaration of title to immoveable property is not barred so long as plaintiff's right to such property is a subsisting right and that the right to bring a declaratory suit is a continuing right so long as the right to the property itself is subsisting. But the dictum of the Calcutta High Court has been dissented from in *Rajah of Venkatagiri* v. *Isakapalli Subbiah*[1]. Even in the latter case. there is no definite indication as to when the right to sue accrues in such cases. In that case, there was an attachment of property by a Magistrate under S. 146 of the Criminal Procedure Code in consequence of the disputes raised by the defendant. The learned Judges say " right to sue certainly accrued on the date of the attachment, which is rightly given as the date of the cause of action." At least some days before the Magistrate attached the property, the defendant must have begun his denial of the plaintiff's title, and how could the date of the attachment and not the date of the original denial be rightly given as the date of the cause of action ? In *Ottappurakkal Thazhate Soopi* v. *Cherichil Pallikkal Uppathumma*[2] it was held that " the right of junior members of a tarwad to sue for a declaration that an alienation by the karnavan is not binding on the tarwad, accrues the moment the document is completed and not when the plaintiff obtains knowledge of the alienation." Now the alienation was evidently made by a registered deed, In that case, the learned Judges held that " the knowledge or ignorance of the plaintiffs of the fact of the alienation having been made does not seem to be material on the question of the accrual of the cause of action for the declaratory suit." In *Dattatraya* v. *Ramachandra*[3] it was held that though the defendants had denied the plaintiffs' title in 1888 before the Survey Officer in a proceeding to which the plaintiffs were not parties, the cause of action for plaintiffs' suit for declaration, filed in 1896, did not accrue in 1888, but in the year 1892 when the defendants opposed the petition put in by the plaintiffs to the Survey Officer to review his order or 1888 passed *exparte*. At page 537 and 531 the learned Judges make some observations which lead one to think that they were of opinion that time must be counted only from the date when the plaintiffs had notice of the entries in the Survey Officer's Register of 1888 and that the conduct and denial of the plaintiff's title must somehow affect the plaintiffs before the right to sue accrues. In *Akbar Khan* v. *Turaban*[4], the defendant, in derogation of the plaintiff's title, had the defendant's own name entered in the revenue papers in respect of the property in suit in 1895. In 1903, the plaintiff attempted to

1. (1902) I. L. R. 26 M. 410 at 416
2. (1909) I. L. R. 33 M. 31
3. (1900) I. L. R. 24 B. 533
4. (1908) I. L. R. 31 A. 9

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have the entry corrected and the defendant resisted the plaintiff. The learned Judges held that there was only one cause of action which arose in 1895 and that the suit, brought within two years of 1903, was barred. They refer to a previous unreported decision of the Allahabad High Court which seems to have taken a different view and try to distinguish it. That unreported decision is set out at page 10 in the notes at the bottom of that page. With the greatest respect, I think that that case so reported in the foot-note cannot be distinguished as was distinguished in the principal case. The learned Judges who decided the case reported in the foot-note say "the courts below reckoned as the starting point the order of the Settlement Officer referred to above. No doubt the plaintiffs might, upon this order being made, have instituted a suit for a declaratory decree, but in our opinion they were not bound to do so. The defendant might have taken no steps *to enforce any right* under the order of the 5th May 1899, but when he did so, plaintiffs, in our opinion, got a *fresh cause of action* for asking for a declaratory decree." Thus, the learned Judges in the footnote case seem to have held that one cause of action accrued when the denial of title took place and a fresh cause of action when the defendant tried to enforce any order made in consequence of such denial of title. In *Mamali* v. *Acharath Parakat*[1] where Article 120 was applied to a suit for pre-emption by an ottidar under the customary law of Malabar, it was held that the right to sue to enforce the plaintiff's right to pre-emption accrued only when he had knowledge of the sale of the land by the mortgagor to a third person. I am inclined to think that, where the right to sue for the declaration of title to immoveable property accrues by reason of a mere denial of title behind the plaintiff's back by the defendant, whether the denial is made orally or by writing or by an act before a public officer, the plaintiff's right to sue could not be held to accrue till he gets knowledge of such denial. Of course, it might be argued that the denial might have taken place several years ago and the plaintiff cannot be allowed to bring a declaratory suit several years afterwards simply because his knowledge of such denial dated only within six years before suit. But this danger is very easily avoided by the court using its very wide discretion to refuse declaration in such circumstances, as the granting of declaratory relief is always in the discretion of the courts (see S. 42 of the Specific Relief Act).

Coming to the facts of the present case, taking the denial of the plaintiff's title by the defendants Nos. 2 and 3 asthe date of the

1. (1912) 23 M. L. J. 607.

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cause of action or as the date of a cause of action, the finding of the lower courts is that the definite denial by the defendants took place in 1908 when the defendants made additions to the building and, when remonstrated with by the plaintiffs, denied the plaintiff's title. But the contesting defendants argued that, when they got into possession in 1898, they must be presumed to have got into such possession adversely to the plaintiffs. Possession is, no doubt, *prima facie* notice to all the world of the right under which possession is taken. But is possession taken by a trespasser of a house adverse not only against the usufructuary mortgagee of the house but also against the mortgagor, though the mortgagor might not be entitled to claim possession at once ? In other words, the question is whether a trespasser's dispossession of the usufructuary mortgagee of a house is adverse possession against the mortgagor barring also the latter's title to the equity of redemption. On this question, there seems to be a conflict of opinion between two recent decisions of two different Benches of this Court, both cases being reported in the 21st Volume of the Madras Law Journal. In *Ramaswami Chetti* v. *Ponna Padayachi*[1] *Abdur Rahim* and *Ayling*, JJ. held that "the existence of a mortgage at the time of the commencement of the adverse possession of the mortgaged property cannot prevent the person in possession from acquiring ownership of the mortgaged land both as against the mortgagor and mortgagee unless it be the case that the adverse possession was intended to be limited to the mortgagor's interest only." In that case the mortgage was a simple mortgage and the mortgagor continued in possession till the trespasser evicted him. In the case reported in page 468 it was held that the interest in the immoveable property which was affected by adverse possession was "that interest and that interest only, which the person who was entitled to immediate possession at the time the adverse possession began had at that time" and that possession adverse to the mortgagor was not adverse to a simple mortgagee. In this case, *Parthasarathi Naikan* v. *Lakshmana Naikan*[2] the learned Judges considered the earlier case in *Ramaswami Chetti* v. *Ponna Padayachi*[1] but declined to follow the said earlier case. The case of *Ramaswami Chetti* v. *Ponna Padayachi*[1] has been reported in I. L. R. 36 Madras page 97. If, in the present case, the principle of the ruling in *Ramaswami Chetti* v. *Ponna Padayachi*[1] be followed, the denial of the plaintiff's title must be held to date from 1898 and the present suit for declaration is barred. If, however, the latter case is followed, the possession of 1898 will

1. (1911) 21 M. L. J. 397. 2. (1911) 21 M. L. J. 467.

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be adverse only to the mortgagee and such possession will not necessarily constitute the denial of the mortgagor's (plaintiff's) title and the suit will not be barred The cases in *Ramaswami Chetti* v. *Ponna Padayachi*[1] and *Parthasarathi Naikan* v. *Lakshmana Naikan*[2] were cases in which it was contended that the simple mortgagee's rights were barred by the fact that the mortgagor (who had been in possession until he was dispossessed by the trespasser) had lost his rights by adverse possession. The present is the converse case; here, the *usufructuary* mortgagee has been dispossessed by the trespasser and the mortgagor who had given up possession to the mortgagee is sought to be barred. But I think the principles to be applied are the same. Is the mortgagor who has transferred possession to a usufructuary mortgagee for 20 years entitled to bring a suit for possession against the trespasser who has ejected the mortgagee within those 20 years? If he is not it seems to me to be hard on the mortgagor to treat the trespasser's possession as adverse against himself also. Having regard to the conflict of views between the cases in *Ramaswami Chetti* v. *Ponna Padayachi*[1] and *Parthasarathi Naikan* v. *Lakshmana Naikan*[2] we deem it advisable to refer the following question for the decision of a Full Bench:—

Where a trespasser dispossesses a mortgagor in possession (the mortgage being simple) or a mortgagee in possession (where the mortgagee is usufructuary), is such possession of the trespasser adverse against the simple mortgagee in the one case or against the mortgagor who is not entitled to possession in the other case?

My learned brother, notwithstanding the case in *Rajah of Venkatagiri* v. *Isakapalli Subbiah*[3] feels some doubt on the question whether the cause of action for a declaration of title does not arise a fresh on each denial of title (so long as the title of the plaintiff subsists). as was held in *Chukkan Lal Roy* v. *Lalit Mohan Roy*[4] bearing in this respect some analogy to a suit for the restitutión of conjugal rights whtch used to be governed by Article 35, Limitation Act XV of 1877 (this article has been omitted from the Limitation Act of 1908). We, therefore, refer this other question also to the Full Bench, namely;

Whether a fresh cause of action for a suit for declaration of title arises from each distinct denial of the plaintiff's title so long as the title itself is not lost, or whether there cannot arise any new causes of action based on new denials of title after the first denial.

Tyabji J.:—I agree.

1. (1911) M. L. J. 397
2. (1911) 21 M. L. J. 467
3. (1902) I. L. R. 26 M. 210
4. (1893) I. L. R. 20 C. 906

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C. V. Anantakrishna Aiyar for Appellant.

S. Muthiah Mudaliar for Respondent.

The Court expressed the following :—

OPINION :—*Sankaran Nair J.* :—The first question that is referred to us is " where a trespasser dispossesses a mortgagor in possession (the mortgage being simple) or a mortgagee in possession (where the mortgage is usufructuary), is such possession of the trespasser adverse against the simple mortgagee in the one case or against the mortgagor who is not entitled to possession in the other case ?".

The facts which gave rise to this reference are these: the plaintiff mortgaged his house with possession for a term which would expire in 1917. The mortgagee was dispossessed by the defendants in 1898. In 1908 they made certain additions to the building, and when the plaintiff remonstrated with them they denied the plaintiff's title to the equity of redemption. The plaintiff brings this suit for a declaration of his title within six years from 1908. The defendants' plea is that limitation for the suit must be calculated from 1898, when they took possession of the property from the mortgagee.

On behalf of the plaintiff it may be argued that, as a mortgagor is not entitled to the possession of his property until he redeems his mortgage, the possession of a trespasser who dispossesses a mortgagee cannot be adverse to him; and, in any event, as the mortgage in the case before us is for a term which has not expired, he could not redeem and recover possession from the trespasser; and limitation cannot run against him when there is no remedy open to him to recover possession of his property. Mr. Anantakrishna Aiyar contends that a mortgagor may sue to recover possession to be delivered to the mortgagee and therefore limitation runs against the mortgagor when a trespaseer takes possession of the property from the mortgagee claiming the property himself.

The question when limitation begins to run against the mortgagor when the usufructuary mortgagee is deprived of the possession of the property mortgaged has come often before this Court. The earliest decision is reported in *Ammu* v. *Ramakrishna Sastri*[1]. In that case, while the representatives of the mortgagees were in possession of the property, there was an enquiry by an officer of the Government, who held that the mortgaged property belonged to the Government, and it was thereupon granted to them by the

(1879) I. L. R. 2 M. 226

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Government under separate pattas. The mortgagor was a party to that enquiry. The District Judge following a Bombay decision (*Vithoba Bin Chabu* v. *Gangaram*[1], held that there could be no trespass on the title of the mortgagor so long as he had only an equitable interest. This decision was reversed in appeal the learned Judges holding that, though there might be cases in which the estate of the mortgagee alone was the subject of trespass and the title by prescription might therefore be acquired to the estate of the mortgagee leaving the estate of the mortgagor unaffected, yet there were other cases in which the rights and interests of both the mortgagor and the mortgagee might be invaded and possession held adversely to them both. And in such cases, where the mortgagor may have made over possession to the mortgagee, if the interest of the mortgor is invaded, although he has not actual possession of the land, his remedy is to bring a suit for the recovery of the interest from which he has been ousted, and he cannot bring a suit for redemption against the wrong-doer within the time allotted for suits for redemption. It will be noticed that in this case a representative of the mortgagee himself was allowed to claim title by prescription. *A fortiori*, therefore, a stranger in adverse possession of the equity of redemption would be entitled to claim such a title.

In *Chathu* v. *Aku*[2], it was pointed out that the right to redeem was only a right of action and therefore, though person received the rents and profits from the mortgagee, claiming to be the owner of the equity of redemption, the right of the true owner was not barred unless the claimant had had actual possession of the property itself for twelve years.

In *Mussad* v. *The Collector of Malabar*[3] the Court held that the action of the Government in merely declaring the lands to be Government property and conferring a title upon the representative of the mortgagee could not affect the mortgagor's title unless the latter was shown to have been aware of these proceedings, and the decision in *Ammu* v. *Ramakrishna Sastri*[4] was distinguished on the ground that in that case there was a formal enquiry to which the mortgagor was a party. In *Ittappan* v. *Manavikraman*[5] Mr. Justice *Subramania Aiyar* was apparently prepared to go further and to hold that, as the mortgagor having once put the mortgagee in possession had no right to the possession of the property himself until the mortgage was paid off, limitation would not commence to run against him in favour of a trespasser till

1. (1876) 12 Bom. H. C. R. 180
2. (1883) I. L. R. 7 M. 26
3. (1886) I. L. R. 10 M. 189
4. (1879) I. L. R. 2 M. 226
5. (1897) I. L. R. 21 M. 153 at 165

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redemption ; but he stated that in the case before him, even if the view adopted in *Ammu* v. *Ramakrishna Sastri*[1] be correct, the possession of the person taking the property from the mortgagee would not be adverse until the mortgagor had notice of it. That was also the opinion of *Shephard J.*

According to these Madras cases, therefore, where a stranger dispossesses a mortgagee in possession, whether adverse possession will run against the mortgagor or not depends upon the fact whether there was dispossession of the mortgagor also. Mere dispossession of the mortgagee will not amount to such adverse possession; there must be at least notice to the mortgagor that possession is held against him also.

The decisions of the other High Courts also are substantially to the same effect. The decision in *Vithoba Bin Chabu* v. *Gangaram*[2] which holds that there can be no adverse possession of an equity of redemption, has been already referred to. It is dissented from by the learned Judges in *Ammu* v. *Ramakrishna Sastri*[1] In a later case, *Puttappa* v. *Timmaji*[3] *Sargent* C. J. and *Candy* J., following the English case of *Cholmondeley* v. *Clinton*[4] held that the possession of a trespasser may be adverse to the mortgagor. In *Chinto* v. *Janki*[5] the same question was fully discussed, and Mr. Justice *Fulton* stated the law in the following terms: "I think that, although the possession of a trespasser may undoubtedly be adverse to the mortgagor, the burden of proving when it became so rests on the former. *Prima facie*, by his act of possession he merely ousts the mortgagee who is entitled to hold the property." Referring to the plea of the trespasser in that case that he had many years before got his name entered in the Government records as owner and had since then purported to hold directly under the Government, he pointed out that there was no finding as to when the plaintiff's name was removed from the survey records and whether the plaintiff had any notice of it, and that it was for the defendant to show when he asserted that he was the owner of the property and not the mortgagee; and he referred to the lower court the issue when the trespasser's possession became adverse to the plaintiff. *Telang* J. was strongly inclined to hold that the mortgagor had no right to recover possession of the property so long as the mortgage money was not paid off ; but he agreed with Mr. Justice *Fulton* in remitting the issue to the lower court for

1. (1879) I. L R. 2 M. 226
2. (1875) 12 B. H. C. R. 180
3. (1889) I. L. R. 14 B 176
4. (1821) 4 Bligh 1. s. c. 4 E. R. 72
5. (1892) I. L. R. 18 B. 51 at 64

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trial. The question was again discussed in a more recent case, *Tarab* v. *Venkatrao* [1]. where *Batty* J. laid down the law correctly in the following words; "No doubt, as long as the mortgagee is in possession, he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, as for instance, his right as heir to represent the original mortgagee, or his right, as in *Puramandas* v. *Jamna Bai*[2] to possession in spite of a third party's lien on the property, then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession; and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor, but to hold in spite of him. In such a case, the mortgagor is as effectually and unmistakeably displaced as if there had been no mortgage at all. When an ouster takes place in that manner the mortgagor knows that no one is in possession who can represent or continue his possession, or who is entitled preferentially to possession, and, therefore, he becomes entitled (and it is necessary and his duty, if he does not want his right to be barred) to claim possession immediately."

There was only one Allahabad case cited—*Imdar Khan* v. *Ahmad Husain*[3], where also the same principle is laid down, that *prima facie* the possession of the trespasser is not full proprietary possession but was possession of a limited nature which would have the effect ordinarily of extinguishing the limited interest of the mortgagee and vesting that in the defendant; but there may be cases where the adverse possession against the mortgagee would also be adverse possession against the mortgagor, as, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor.

These cases establish that an equity of redemption may be lost by adverse possession; but for that purpose it is not sufficient for a trespasser, who has ousted a mortgagee, to prove that possession is held on an exclusive title, without also showing that it was

1. (1902) I. L. R. 27 B. 43 at 68 2. (1885) I. L. R., 10 B. 49
3. (1907) I. L. R 30 A. 119

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acquired and retained with an assertion of an adverse title to the knowledge of the mortgagor. These decisions were apparently not cited before the learned Judges who made the reference. They are in accordance with the English Law also. That an equity of redemption may be barred, has been finally decided in England. In the leading case of *Cholmondeley* v. *Clinton*[1], Lord Chancellor Eldon said "I say, without entangling myself with the difficulties about seisin and intrusion, I am of opinion, that the adverse possession of an equity of redemption for twenty years is a bar to any other person claiming that equity of redemption; and it is an adverse possession which produces the same effect as those things you call abatement, intrusion and disseisin which belong to legal estates. It is an adverse possession which has the same effect and, for the peace of families, and for the peace of the world, I think ought to have the same effect; and therefore, without going through more of the cases, I submit it to your Lordships, as my humble opinion upon this grave and important question, that this bill cannot be maintained." The owner of the equity of redemption had full notice of the claim of the trespasser.

These decisions also seem to be consistent with principle. When the owner of the property in possession is dispossessed, the trespasser's possession is clearly adverse to him from its inception, as, to his knowledge, the property is held against his will, and he must assert his right within twelve years of his dispossession. But if his mortgagee, who has been placed in possession by him, is followed by another person there is no presumption in law that such possession was taken without any right. He may be an assignee of the mortgagee, or one who purchases the mortgage as a mortgage; or he may be an adverse claimant to the mortgage right; where more than one inference may be drawn, that inference should not be drawn which imputes a wrongful act to a person. The defendant has therefore to show that he took possession of this property as absolute property in contradistinction to mortgage property. Nor is this sufficient; as his possession may be consistent with the mortgagor's title, the mortgagor must obviously have notice that he is holding it as absolute property in denial of any right in him. Otherwise no laches can be imputed to him and the possession cannot be said to be adverse.

It is argued that, as the mortgagor is not entitled to sue the trespasser for possession, possession can never be adverse. A mortgagor, no doubt must be entitled to protect himself against the loss

1. (1881) 4 Bligh I at p 105. s. c. 4 E. R. 721

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of his property by adverse possession. In the judgment in *Ammu* v. *Ramakrishna Sastri*[1] it is stated that he may sue for the recovery of his interest. This apparently proceeds on the ground that by mortgage a person transfers only an interest and not the legal estate as in English Law. In *Tarubai* v. *Venkataras*[2] Mr. Justice *Batty*'says he could sue for possession. This proceeds probably on the ground that the mortgagor is bound to secure possession to the mortgagee. Mr Anantakrishna Aiyar contends that a mortgagor may by impleading the mortgagee obtain a decree for the surrender of the property to the latter. Suits by persons interested for delivery of properties to a trustee of an endowment, by junior members of tarwards for delivery of properties improperly alienated to Karnavans, are analogous instances. The question what the proper remedy is, does not however arise on this reference.

The reply to the reference is that possession may be adverse; but whether it is so or not in any case, will depend upon the facts of each case. On the facts stated in the order of reference, possession of the trespasser was not adverse from 1898 to 1908 but it became adverse in 1908. The question whether the possession of a trespasser who dispossesses a mortgagor in possession is adverse against a simple mortgagee does not arise in the case and we express no opinion with regard to it.

As the cause of action in this case arose only in 1908, the second question, whether a fresh cause of action arises from each distinct denial of the plaintiff's title, also does not arise in the case and we express no opinion with regard to it.

The Chief Justice:—I agree.

Oldfield J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, Chief Justice, and Mr. Justice Sankaran Nair, and Mr. Justice Oldfield.

[FULL BENCH.]

Rao Sahib Pydah Venkatachalapathi Garu and others. } **Appellants.* (*Defendants.*)

v.

Muthu Venkatachalapathi (died and another. } *Respondent*. (*Plff's. L. R.*)

Pydah Venkatachalapathi v. Muthu Venkatachalapathi

Registration Act S 49—Immoveable property—Evidence of transaction affecting—Registered sale deed—Contemporaneous unregistered letter—Admissibility of—As evidence that mortgage was intended—Or as evidence that no title passed.

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*L. P. A. No. 228 of 1912 — 7th January 1914

1. (1879) I. L. R. 2 M. 226

2. (1902) I. L. R. 27 B. 43

Pydah Venkatachalapathi v. Muthu Venkatachallapathi

Held: an unregistered letter cannot be used to show that a registered sale deed did not convey the absolute interest but was intended to operate only as a mortgage.

Held further that it is inadmissible also for the purpose of showing that the sale conveyed no title to the defendant the intention of the parties being that it should operate as a mortgage and not otherwise. To use it for that purpose would be to use it as evidence of a transaction affecting immoveable property.

Appeal under S. 15 of the Letters Patent from the decree of this Court dated the 23rd September 1912 in Appeal No. 46 of 1909 preferred against the decree of the Court of the Subordinate Judge of Cocanada in O. S. 22 of 1909.

T. R. Ramachandra Aiyar and *T. Rangachariar* for Appellant.

P. Narayanamurthi for Respondent.

The Court delivered the following

Judgment.—If the claim of the plaintiff in the present suit is to be treated as based on the footing of a mortgage-transaction we think it is clear that, as was held in *Mutha Venkatachalapathi* v. *Pynda Venkatachalapathi*[1] that the unregistered letter cannot be received as evidence of such a transaction.

Assuming the plaintiff is entitled to sue for possession on the ground that no title passed to the defendants under the sale deed (Exhibit A), in order to succeed he must show that by virtue of the unregistered letter the sale deed does not affect the immoveable property which is comprised both in the sale deed and in the unregistered letter, in the way in which the sale deed purports to affect the property, and would affect the property if the unregistered letter had never been written. This being so it seems to us the unregistered letter is relied on as evidence of a transaction affecting immoveable property and, being unregistered, is inadmissible in evidence.

We think the principle of the decision in *Achutaramaraju* v. *Subbaraju*[2] applies to this case.

The Appeal must be allowed with costs in this Court and the suit dismissed. There will be no order as to costs in the Court of First Instance.

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1. (1903) I. L. R. 27 M. 348 2. (1901) I. L. R. 25 M. 7

the Judicial Commissioner's Court, this appeal was preferred to His Majesty in Council.

As the deposit by way of security for costs as well as for printing at the Privy Council had not been made in the High Court, the leave to appeal was withdrawn. Thereupon the appellants applied to the Privy Council and obtained leave to appeal on the ground that the delay in paying the amount in question was unavoidable as the estimate for printing &c., was exorbitant and that certain papers immaterial to the case should have been left out. She was however,ordered to deposit £300 by way of security for the costs of the respondent in England, which being done the record was sent for from India and the appeal was heard in due course.

De Gruyther K. C. and *Jackson* for the appellants contended that the evidence on record established the genuineness of the will as duly executed by Narindra Bahadur on October 21st 1904. It was attested by servants who were in the confidence of the testator as well as by Chandhir Nasrat Ali who was a man of great respectability and thoroughly disinterested. The action of the Judicial Commissioner in admitting additional evidence at the appeal which was used to discredit the evidence of Nasrat Ali one of the witnesses to the will without giving him an opportunity of being heard in explanation was improper and not warranted by the Code of Civil Procedure, and operated seriously to the prejudice of the appellants.

Ross K. C. and *Dube* for the respondent contended that the will was a forgery. It was written on a paper which was an old one ; the witnesses were all servants of the lower grade. Chandhir Nasrat Ali was supposed to have signed it on the day he was at Lucknow attending a Board meeting and it appeared impossible for him to be present to attest the will. The appellants made no attempt to clear up the additional evidence. The burden of proof was upon the appellants to prove the will and they have utterly failed to discharge it. Instead of good reliable evidence, there was discrepan t and suspicious evidence.

De Gruyther K. C. was not called upon to reply.

The judgment of their *Lordships* was delivered by

Lord Shaw. :—The only question raised at the Bar of the Board was whether a will executed on the 21st October 1904 by one Kuar Narindar Bahadur is or is not a genuine will.

Its provisions are substantially these : That after his death his widow should be proprietor of his estate in the Kheri District, and

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should have absolute power over the estate in the Hardoi District and hold proprietary possession over all his estate. By the third clause of the will it was provided that after her death " Raj Bahadur, my sister's son, shall be the absolute owner of all my property, movable and immovable, of every description." Other provisions, including certain annuities to the testator's brother-in-law, occur in the will.

Ex facie it was duly executed and properly attested, and the witnesses are, first, his Diwan, or general agent; secondly, a servant who appears to have had charge of the wardrobe and a certain power of supervision, including that of making purchases; and lastly, his treasurer, or confidential clerk. In the words of the Subordinate Judge,—

"The scribe of the will is the mukhtar, and the three attesting witnesses " are the diwan, the treasurer, and the daroga of late Kuar Narindra Bahadur, " who were his respectable private servants, and used to be always in the " house, as is the case with Indian gentlemen in the position of the Kuar."

The domestic position of the testator and the parties was this: Durga Parshad, the Respondent, was remotely related to the testator Narindra, and for years had been on terms of enmity with him. Details of this are given, as for instance, that they had not been on " eating and visiting terms," and that there "used to be no exchange of presents during marriages." Both the Courts below are clear upon the subject, the Judicial Commissioner's opinion being so strong as this, that " the ill-feeling, however, which existed between " the two men was quite sufficient to cause Narindra Bahadur to " desire that this property should not go to the Plaintiff or his " branch of the family."

On the other hand, the Appellant, the testator's sister's son was treated with regard and affection by the testator, and upon this subject also both Courts have no doubt. In the language of the Judgment of the Judicial Commissioner :—

" In respect of the feelings which existed in Narindra Bahadur's mind to" wards the Defendant, Raj Bahadur, there can also be but little doubt . " Narindra Bahadur treated his sister's son as if he were his own son in every " way , . . This feeling of affection towards his sister's son by a childless " Hindu is fairly common; and, after full consideration of the evidence on the " point, I have no hesitation in holding that Narindra Bahadur did look upon " Defendant No. 2 more or less in the light of a son It would, therefore " not have been a matter for surprise if he had made a will benefiting the " latter."

This being the state of the relations of the parties to the testator, it stands conceded that the will now challenged was in every

respect a natural will, and in accord with his feelings and tenour of life. Granted, therefore, that its execution is proved by anything like reasonable evidence, the presumptions of law are in favour of its being maintained. The Subordinate Judge, after a close analysis of all the evidence, affirms its validity, and that without hesitation. Every kind of challenge was made of it,—of its execution, of the status of the witnesses, of the health of the testator, and so on. But at the end of a long litigation upon the subject it was admitted by Mr. Ross, the learned Counsel for the Respondent, in his clear and candid argument at their Lordships' Bar, that the signature was genuine, nor could he venture to disturb what he admitted were concurrent findings on the subject of the Appellant's position in the testator's household being equal to that of a son, nor upon the point of the estrangement between the testator and the Respondent.

This makes an end of a considerable portion of the Judgment of the Judicial Commissioner, which treats the signature as suspect. The grounds of suspicion which that Court, notwithstanding its view as to the complete propriety and naturalness of the will itself nevertheless attaches to the execution, are three-fold.

1. In the first place, it is maintained that the witnesses might have been of a better class. Perhaps they might; but they were just those witnesses that the testator had about him; and a comment of this character has no force except upon something on a much higher level than mere suspicion, viz., proof which would thoroughly satisfy the mind of a Court that these persons had committed both forgery and perjury. In the case of a will reasonable, natural, and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable, or tinged with impropriety. Their Lordships venture to repeat the Judgment of Lord Watson in *Choteynarain Singh* v. *Mussamat Ratan Koer*[1] bearing upon the point of an attestation by a person's own servants and dependants. As has been shown, the execution of this will was not only not improbable, but was in fact probable. The words of Lord Watson apply to this case, therefore, *a fortiori*:—

"The theory of improbability remains to be considered; and the first observation which their Lordships have to make is, that, in order to prevail against such evidence as has been adduced by the Respondent in this case, an improbability must be clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility. To give effect the argument pressed upon this Board by the Appellants, which seems to have found

1. (1894) L. R. 22 I. A. 12; s. c. I. L. R. 22 C. 519.

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favour in the Court of First Instance, would be equivalent to holding that the will of a Hindu gent'eman, attested by his own servants and dependants, must be held to be invalid, unless it is shown that the testator, at the time assigned for its execution, was placed in such circumstances that he could not secure the attendance of persons of a higher rank. That is a proposition which verges too closely on the absurd to be seriously entertained. There may be cases in which attestation by servants only is an important element to be taken into account in considering whether a will has been validly executed—cases, for example, in which there is reasonable ground for suspicion that the will, is not the voluntary act of the testator, but has been procured by the undue influence of members of his household. This case does not in the opinion of their Lordships, belong to that class."

This point, however, is at an end because the execution and attestation are proved.

2. The second ground of suspicion in the minds of the Judicial Commissioners was that the paper upon which the will was written appeared to be old instead of fresh, and proof was given that the paper was official paper in general use, together with evidence that some other people had been in the habit of having forms or sheets which they signed in blank. In the language of the Judgment of the Judicial Commissioner:—

" That men of the deceased's position in life do sign blank forms and blank "sheets, especially for the purpose of Vakalatnamas being drawn up thereon " for use in cases in the subordinate district courts, is not an unheard-of " thing."

Various forms were produced, signed by people other than the testator, and with none of which the testator had anything to do. In their Lordships' opinion, such evidence should not have been allowed to influence the mind of a Court. It should not have been admitted, as it was not relevant to the present case.

3. The third matter appears, however, to their Lordships to be more serious. By S. 563 of the Code of Civil Procedure it is provided that if " the Appellate Court requires any document to " be produced, or any witness to be examined, to enable it to pro- " nounce judgment, or for any other substantial cause, the Appel- " late Court may allow such evidence to be produced or document to be received or witness to be examined." In the course of the hearing of this Appeal by the Judicial Commissioners, a question was asked as to the additional attestation of the will, which bore to have been made on the 20th April 1905 (that is, on a date about six months after execution) by Mohammed Nusrat Ali. This gentleman appears from the Record to be a person of standing, the Judgment mentioning that he is the Honorary Secretary or Assistant Secretary of the British Indian Association. He is also a member

of the Municipal Board of Lucknow, Lucknow being thirty miles by train from Sandila, where the will was ordered to be registered. On this date, 20th April, a meeting of that Municipal Board had been held, followed by a special meeting, both meetings being early in the day and being of some duration. Enquiry was made, and it was proved before the Judicial Commissioners that Nusrat Ali was present at these meetings. If this was so, then, it was argued, he could not at the same hours of the 20th April have been in Sandila.

Nusrat Ali had been examined before the Subordinate Judge, but nothing had been asked of him on the point, and he was not examined by or before the Judicial Commissioners. Their Lordships disapprove of the procedure which has permitted doubt to be thrown upon his evidence in the course of procedure taken on appeal by the Judicial Commissioners, " to enable them to pronounce judgment," without the witness whose testimony is impugned having been afforded the opportunity of clearing up the mistake and having been convened for that purpose. No witness, whatever his standing, would be safe from adverse judicial comment under such procedure. It may quite well be that Nusrat Ali could have clearly explained the whole point of difficulty, and their Lordships would be slow to conclude, in the absence of his own evidence on the point, that the rest of his testimony, otherwise quite unimpeachable, was perjury.

Fortunately, there is no necessity for further procedure or expense in regard to the matter, for the case that the Board is now dealing with is a case in which the signature of the will, whether the deed was additionally attested on the date stated or not, is proved and is properly attested. In these circumstances their Lordships do not doubt that the Judgment of the Subordinate Judge should be restored.

They will accordingly humbly advise His Majesty to that effect. The Respondent will pay to the Appellant the costs of this Appeal, and in the Courts below.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondent : *Barrow, Rogers and Neville.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Spencer.

Sinnu Gowndan and another. } *Accused in Calendar Case No. 612 of 1913 on the file of the Stationary 2nd class Magistrate of Gingee in South Arcot District.*

Criminal Procedure Code Ss. 247, 417, 435, 439—Acquittal by trick of accused—Not ground for revision—Otherwise if appeal is filed by Government—Appeal on the ground of discovery of fresh evidence or sufficient cause for absence of complainant—Appeal not restricted to errors on the face of record—Permissibility of, for good reason for errors not apparent—Appeals against acquittal and conviction—No difference.

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The fact that the accused obtained his acquittal under S. 247 Cr. Pr. Code by preventing the complainant from appearing when the case was called on by wrongfully arresting and detaining him on a false charge of nuisance is not a ground for setting aside the order of acquittal in revision, whether directly at the instance of the complainant or on a report of the District Magistrate at his instance, though it may be a good ground for appeal.

Per Miller J.—Quaere, if an order of acquittal can be set aside even on appeal merely on the ground that fresh evidence is available which could not be produced at the trial or on the ground that the complainant owing to whose absence the order of acquittal was made has shown sufficient reason for his failure to appear.

Per Spencer J.:—There is nothing in S. 417 Cr. Pr, Code to limit appeals against acquittals to cases in which Courts have owing to some error of law or misappreciation of evidence come to a wrong decision on the evidence before them. S. 248 Cr. Pr. Code allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the District Magistrate of South Arcot in his letter, dated 12th October 1913.

The District Magistrate, Referring Officer.

The Public Prosecutor on behalf of Government.

The Court made the following.

Order:—*Miller* J.—As the Criminal Procedure Code does not permit a Magistrate to review his judgment in the light of evidence subsequently obtained or to re-admit to file a case in which the accused has been acquitted under S. 247 owing to the absence of the complainant, even if good reasons shewn for his non-appearance, I should hesitate without further consideration to hold that the legislature intended to permit this Court in Appeal or revision to set aside an acquittal on the ground that fresh evidence is available which could not be produced at the trial, or on the ground that a

* Cr. R. C. No. 673 of 1913. 22nd January 1914.
(Cr. R. P. No. 95 of 1913.)

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complainant has shown sufficient reason for the failure to appear and prosecute his complaint, before the Magistrate in a summons case. But in the present case we must take it that the acquittal of the accused under S. 247 was procured by his own trick: he himself is responsible for the complainant's failure to appear. The order was, we may say, obtained by a fraud on the court and though even in these circumstances the Code does not permit the court which made the order, to vacate it on proof of the fraud interference by this court may be a proper exercise of our powers in revision, or possibly in appeal, to avoid a miscarriage of justice.

We have not referred to any case in England in which *certiorari* has been had to quash an order of acquittal made by an inferior court for fraud in the person procuring the order. There is a case *R.* v. *Unwin*[1] (referred to in Archibold's Criminal Pleadings 23rd Edition Page 132. 10 Halsbury's Laws of England page 197 Foot Note) which seems to have been something like the present case and in which *certiorari* was refused, but I have not been able to see the report of that decision. But we have the authority of Archibold's Criminal Pleadings (23rd Edition page 292) for saying that a new trial after acquittal in a case of misdemeanour would be granted if the verdict had been obtained by irregularities committed by the defendant himself and though no case is there cited in which a new trial has actually been allowed on these grounds, the authority of Archibold's Treatise is so high that it is not unsafe to accept it as correctly stating the principle on which the courts would have acted in England in former days.

In India we have power to revise an order which is improper (S. 435 of the Code of Criminal Procedure) and an order, though strictly in accordance with the law as in the present case, may, I think be said to be improper if it was procured by the fraud or trick of the party asking for it and would not have been made but for that fraud or trick. The order before us is one which but for the accused's deceit would not have been made in the circumstances, and so may be said to be an improper order though the Magistrate's action was strictly correct.

Our powers in appeal are not defined by the code, further than this, that an appeal may lie on a matter of fact as well as on a matter of law except in a case tried by a jury (Sec. 418).

The Code does not expressly state whether these matters are matters appearing upon the record, that is, matters, which the inferior Court has or might have determined, or whether we are at

1. (1839) 7 Dowl. 578.

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liberty to admit an appeal on some extraneous matter which ought to have affected the decision had it been known at the time of the trial—but which was not before the inferior Court.

I have not found a case in any of the High Courts which decides the point. In *Queen Empress* v. *Prag Dat* [1] the learned Judges state as one of the requirements of an appeal that the ground for interference should be apparent on the record, but it cannot be said that they were deciding the present point.

But there is nothing in the Code of Criminal Procedure to suggest that so far as the right of appeal is concerned there is any difference between the case of an appeal from a conviction or from an acquittal, and I should not like to hold that an appeal from a conviction could not be entertained if based on the concealment of a material fact from the Court which conducted the trial. I agree therefore that in this case the Local Government might have directed the filing of an appeal against the acquittal and that being so I agree also that we ought to refuse to interfere on the District Magistrate's report of the Case.

The District Magistrate is, no doubt not the party entitled to appeal from an acquittal but his report to the High Court is intended to move the Court to act under S. 439 of the Criminal Procedure Code, that is, to act as a Court of revision and though it is made at the instance of the complainant it contains the District Magistrate's presentation of the case and it seems to me that to entertain proceedings by way of revision on a District Magistrate's report in a case where an appeal would lie from an acquittal is contrary to the spirit if not to the letter of Sub-section 5 of S. 439 of the Criminal Procedure Code.

Spencer J.:—In this case the complainant preferred a complaint of mischief under S. 426 Indian Penal Code on June 4th against two individuals; process was issued against them and the complainant was informed of the date of hearing in person. On June 23rd, the date fixed for the trial, the Magistrate acquitted the accused under Sec. 247 Criminal Procedure Code owing to the complainant not being present in Court when the case was called on. It subsequently transpired that the complainant had been kept out of the way by the action of the accused in getting a constable to arrest him on a false charge of committing nuisance after he had come to Gingee where the Magistrate's Court was situated, (see the judgment in C. C. No. 638 of 1913 on the file of the 2nd Class Magistrate of Gingee). Under these circumstances the District Magistrate

1. (1898) I. L. R. 20 A. 459 at 464.

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has under S. 438 referred the case to the High Court for setting aside the order of acquittal and for directing a new trial.

The question for our decision is whether, assuming that the 2nd Class Magistrate would have exercised his discretion differently by adjourning the hearing to another day had he been aware of the cause of the complainant's failure to appear, this Court acting as a Court of Revision will set aside the acquittal and order a fresh trial.

Upon the materials before him when the order under S. 247 was passed the Magistrate's procedure was strictly proper and in accordance with law. This Section declares that the Magistrate shall acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day. Such an acquittal after the accused has appeared and answered to the charge will operate as a bar to his being again tried for the same offence as he is a person "tried" by a Court within the meaning and for the purpose of S. 403 C. P. C. (*Suraiya Sastri* v. *Venkata Rao* [1]). The Magistrate has no power to revive the proceedings, as there is no provision in the Code of Criminal Procedure resembling Order 9 Rule 4 of the Civil Procedure Code by which a case can be restored to file by the Court which dismissed it; nor can the District Magistrate order a re-hearing (*Narayana Aiyar* v. *Janaki Ammal* [2] *Rangasami* v. *Narasimhalu*[3] and *Empress* v. *Hardee Singh and others* [4]).

Coming next to a consideration of what are the powers of the High Court in such a matter, I think there can be hardly any doubt that if this matter came up for determination in a court governed entirely by English law the answer to the question whether the acquittal could be interfered with would be in the negative.

In English Courts the maxim of *Nemo bis vexari debet* is given full scope. It has been repeatedly held in England that if an accused person has been once tried and acquitted upon the merits by a court of competent jurisdiction so as to have been put in peril of conviction he cannot again be tried upon the same charge, but if charged he can successfully plead *autrefois acquit.* It is true that in *R.* v. *Scaife* [5] a new trial was ordered in a case where one of the accused indicted for felony procured the absence of a witness whose evidence taken before a Magistrate was read against himself and others jointly tried with him.

1. (1886) Weir Vol. 11 p. 457.
2. (1881) Weir Vol. 11 P. 808
3. (1883) I. L. R. 7 M. 218
4. (1891) 11 A. W. N. P. 120
5. (1851) 17 Q. B. 238 S. C. 117 E. R. 1271.

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But *R.* v. *Scaife*[1] was dissented from in later cases, *R.* v. *Bertrand*[2] and *R.* v. *Murphy* [3].

In England the courts have resolutely set their face against granting new trials after acquittals for murder and felony on the ground of misreception of evidence, misdirection, or that the verdict was against the evidence and the same principle has been extended to misdemeanours also. See *R.* v. *Duncan* [4].

It has been further held that acquittals and dismissals cannot be quashed by *certiorari* even though the Justices who tried the cases were disqualified by interest or bias *R.* v. *Galway Justices* [5] and *R.* v. *Antrim Justices* [6]. The latest case on the point is that of *Rex* v. *Simpson and others* [7]. Exparte Smiths on K. B. D. October 23, 1913 reported in the Law Journal of November 8th at p. 646 and the Law Times Vol. 136 p. 10: in which the doctrine has been stretched to the length of holding that a dismissal of information could not be disturbed even though one of five justices who acquitted the accused was disqualified and though the court might be said to that extent not to be a competent tribunal.

In India however matters stand upon a different footing. Here appeals against orders of acquittal are allowed by S. 417 Criminal Procedure Code, a provision of law which is quite aline to the principles upon which English Courts administer the law against criminals. We have also S. 403 which prohibits a second trial for the same offence provided that the conviction or acquittal at the first trial remains in force. If the conviction or acquittal is set aside by a court of competent jurisdiction, it follows that the accused cannot successfully plead the original decision in bar of further proceedings.

The safeguard of the subject consists in the fact that no appeal against an acquittal will lie except at the instance of Government and that Government only exercise this power in cases in which there has been in their opinion a substantial failure of justice.

It appears *prima facie* that there was a failure of justice in the present case if the complainant was prevented from prosecuting his complaint and obtaining the redress that the criminal law allows owing to a circumstance beyond his control, namely his wrongful arrest and detention on s false charge, a fact which the court which tried the case of nuisance found to be true. But this was a circumstance which was not in evidence at the time when the court passed the order of acquittal under S. 247 Crl. P. C., on the complaint of mischief. Of course he may have his remedy in an action in tort

1. (1851) 17 Q. B. 238
2. (1867) L. R. 1 P. C. p. 520.
3. (1865) L. R., 2 P. C. 535.
4. (1881) 7 Q. B. D. 198.
5. (1906) 2 W. R. 449
6. (1895) 2 Ir. Rep. 603.
7. (1915) 136 L. T. 10

for malicious arrest against the constable, or against the accused if he instigated the constable, or he may proceed criminally against them, if so advised, for offences under Ss. 211 and 341 I. P. C. but he will still have a grievance that his complaint of mischief has not been heard.

Now there is nothing in the language of S. 417 Crl. P. C. to limit appeals against acquittals to cases in which courts have owing to some error of law or misappreciation of evidence come to a wrong decision on the evidence before them.

It has been held that the legislature has allowed by this section an appeal by the Local Government in the widest terms and without any limitation whatever. See *Empress of India* v. *Judoonath Gangooly* [1] and that there is no distinction in the Code between the right of appeal against an acquittal and the right of appeal against a conviction, both being governed by the same rules and being subject to the same limitations; see *The Queen Empress* v. *Bibhuti Bhusan Bit* [2], *Queen Empress Prag Dut* [3] and *King Emperor* v. *Chatter Singh and others* [4].

S. 428 Crl. P. C. allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions, although cases in which this power is exercised will naturally be rare.

I would therefore be prepared to set aside the order of acquittal in this case and order a retrial, if the matter had come before the court by way of appeal presented by the Local Government under S. 417.

But in revision it has always been regarded as a sound rule of practice not to interfere when there is no error in law or on the face of the record (*Emperor* v. *Sakharam* [5], *Kashab Chander Roy* v. *Akkil Metoy* [6]; also *Emperor* v. *Tirth Das Newalram* [7]) and not to interfere in cases of acquittal in which Government might have appealed under S. 417 Cr. P. C. but has not done so. See *In the matter* of *Aurokiam* [8] also *Thandavan* v. *Perianna* [9], *Emperor* v. *Madar Baksha* [10] and *Empress* v. *Miyaj Ahmed* [11]. In the former respect the Courts in India conform to the practice of the English Courts when dealing with writs of *certiorari* and

1. (1877) I. L. R. 2 C. 278.
2. (1890) I. L. R. 17 C. 485.
3. (1898) I. L. R. 20 All. 459.
4. (1904) 7 Punjab Record Vol. 89 P. 15
5. 4 B. L. R. p. 686
6. (1895) I. L. R. 22 C. 998.
7. (1918) The Criminal Law Review Vol. 1 p. 15
8. (1878) I. L. R. 2 M. 88
9. (1891) I. L. R. 14 M. 868
10. (1902) I. L. R. 25 A. 128
11. (1878) I. L. R. 3 B. 150

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the now obsolete writs of error; for the latter practice there is now the authority of clause 5 of Sec. 439 Crl. P. C.

In *Queen Empress* v. *Hardee Singh and others* [1] *Straight J.* acting in revision ordered a new trial upon the reference by the Sessions Judge when the accused had been acquitted under Sec. 247 on a complaint of mischief and assault owing to the complainant's absence through fever, but this is the only reported instance that I have been able to discover of a High Court in exercise of their revisional powers setting aside an order of acquittal upon facts not before the Court that tried the case. Even that instance was prior to the introduction of clause 5 of S. 439 by Act V of 1898.

I therefore consider that our proper course is to refuse to interfere with the acquittal on the District Magistrate's reference.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir Charles Arnold White, Kt. Chief Justice and Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

Yellammal ... *Appellant.**

v.

Ayyappa Naick ... *Respondent.*

Yellammal v. Ayyappa Naick.

Limitation Act (Act IX of 1908), art. 29, 62, 120—Attachment of debt—"Wrongful seizure of moveable property"—Suit by claimant to the debt attached against decree holder—proper article applicable.—Art. 62 or 120.

Neither attachment of a debt nor payment in pursuance of such attachment constitutes "seizure of moveable property under legal process" within the meaning of Art. 29 of the Limitation Act The proper article applicable to a suit by a claimant to the debt attached against the decree-holder to whom the amount of the debt was paid is either Art. 62 or Art. 120.

Appeal under Clause 15 of the Letters Patent from the decision dated 30th August 1912 of the Hon'ble Mr. Justice Sundara Aiyar in S. A. No. 101 of 1911 preferred against the decree of the Court of the Subordinate Judge of Tuticorin in A. S. No. 385 of 1909 filed against the decree of the Court of the District Munsif of Tuticorin in O.S. No. 310 of 1908. See 23 M. L. J. 519 for a report of the judgment of the Division Bench.

The Court delivered the following

Judgment:—*The Chief Justice.*—The qustion for determination in this appeal is—Is the plaintiff's suit barred by limitation?

* L. P. No. 166 of 1912. 19th January 1914.

1. (1891) 11 All. Weekly Notes 120.

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The material facts and dates are as follows :—

On July 4th 1905 the 4th defendant who had obtained a decree against one Perumal Naik, attached a debt alleged to be due to Perumal Naik by the 1st defendant.

On July 29th 1905 the alleged debt became payable.

On November 6th 1905 the 1st defendant obtained on order of Court giving him leave to pay the amount of the debt into Court. On June 15th 1906 the 1st defendant paid the money into Court. On October 3 1906 the money was paid out to the 4th defendant.

On the attachment of the debt the plaintiff had put in a claim petition alleging that the debt was payable to him as having been assigned to him by Perumal Naik prior to the attachment. This petition was dismissed. He then instituted a suit under S. 283 of the Civil Procedure Code (1882). He failed in the Court of First Instance but succeeded on appeal.

On September 15th 1908 he instituted a suit for the recovery of the money which had been paid out of Court to the 4th defendant.

If the period of limitation is 3 years and runs from the date of the attachment of the debt—(July 1st 1905) the suit is time-barred. If it is 3 years and runs from the date of the payment out of Court to the 4th defendant (October 3, 1906) the suit is in time.

The appellant has contended that the appropriate article is article 29 and that the suit is time-barred.

It is not necessary to consider whether the suit is for compensation within the meaning of the article. Assuming it is, the question is did the attachment of the debt constitute a "wrongful seizure of movable property under legal process" within the meaning of the article. There is no doubt there was a "legal process" but was there any "seizure" thereunder? I am of opinion that there was not.

The procedure in connection with the attachment of a debt not secured by a negotiable instrument is regulated by Order XXV rule 46 (See S. 268 of the Old Code). The attachment is made by a written order prohibiting the creditor from receiving the debt and the debtor from making payment thereof until the further order of the Court. In the case of moveable property the broad distinction seems to be that when the property is in the possession of the

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judgment-debtor at the time the order of attachment is made the procedure is by seizure actual or constructive. See for instance Order XX rule 43 (moveable property other than agricultural produce), rule 44 (agricultural produce). When the property is not in the possession of the debtor the procedure is by way of prohibitory order. The only exception to the general rule appears to be in the case of a Negotiable Instrument (rule 51). In the case of any negotiable instrument to which that rule applies the attachment must be made by actual seizure whether the instrument is in the possession of the judgment-debtor or not. Under the English Law the question whether an act of the sheriff constitutes a seizure is one of fact, the test being whether an act has been done sufficient to intimate to the judgment-debtor or his servant that the goods have been seized. See the case cited in Halsbury's Laws of England, Vol. XIV, paragraph 108. See, too, *Multan Chand Kanyalal* v. *Bank of Madras*[1].

As it seems to me seizure involves something in the nature of a transfer of possession, actual or symbolical. Not only is no transfer of possession effected by the making of a prohibitory order in the case of a debt due to the judgment-debtor under rule 46, but the order contemplates possession not by the judgment-creditor but by the judgment-debtor's debtor pending the further order of the Court.

The appellant in this case cannot rely on the payment into Court by the 1st defendant (judgment-debtor's alleged debtor) on June 15. 1906 as a seizure under legal process. The payment was a voluntary payment made by way of an interpleader proceeding. I do not think that the payment of money into court " in consequence of a legal process of attachment" is in all cases enough to constitute "a seizure." In the present case the payment was no doubt made in pursuance of, as well as in consequence of, an express order giving leave to pay in (the actual order is not before us). But the order was made on the application of the judgment debtor's alleged debtor who wished to have the protection of the order of the court. There is no reason to suppose that any order for leave to pay the money in, would have been made against the judgment-debtor's alleged debtor if he had not asked to be allowed to make the payment. In *Jagjivan Javherdas* v. *Gulam Jilani Choudhri*[2] the question whether the attachment of the debt constituted a seizure does not seem to have been considered.

1. (1903) I. L. R. 27 M. 346

2. (1883) I. L. R. 8 B. 17

On behalf of the appellant it has been contended, in the alternative that article 36 applies. I am clearly of opinion that it does not.

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I think this case is distinguishable from *Narasimha Row* v. *Gangarajan*[1] where the majority of the court were of opinion that article 29 applied. There the attached property was ordinary moveable property.

I am of opinion that either article 62 or article 120 applies and would dismiss this appeal with costs.

Sankaran Nair J :—I agree.

Oldfield J :—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Chinnan and others — *Appellants**. (*Plaintiffs.*)

v.

Kondam Naidu and another — *Respondents* (*Defendants*).

Mirasi Tenure in Chingleput District—Mokhasa Inam—Conversion to Shrothriem—Shrothriemdars, Ekabhogam mirasidar—Tenants in long possession—Madras Estates Land Act, Ss. 3, clause 2 (d) and 55—Revenue Courts—Jurisdiction of.

Where in 1802, when a Shrotriam was granted, the grantee was also the mirasidar,—

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Held: that there being nothing to show that the latter had lost the Kudiwaram right which prima facie vests in the Mirasidar, the village could not be held to be an estate within the meaning of S. 3 cl. 2 (d) of the Estates Land Act and an action for enforcing the tender of pattas is unsustainable.

Mirasi tenure, its origin and incidents discussed.

Per *Sadasiva Aiyar* J. :—An Ulkudi Payakari by continued residence in the village and cultivation of the same lands for three generations acquired a permanent right of occupancy.

In the case of a Mirasidar to whom an Inam was granted long ago there is no presumption against his having also owned the Kudivaram right at the time of such grant.

A person cannot be held to own the Kudivaram right in its true and complete sense unless he has also the power of alienating his right of occupancy and unless he does not acknowledge himself to be merely the tenant of a person really owning the Kudivaram right.

Per *Spencer* J. :—The word Kudivaram may be used in two senses (1) the right of occupancy (2) the share of the produce which the cultivator whoever

*S. A. Nos. 1716 to 1756 of 1912. 24th October 1913.

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he may be, actually gets. It is in the former sense that the word is used in the Estates Land Act S. 8 cl. 2 (d).

Encroachments on Mirasidar's rights took place only in the 19th century and the probabilities are that in 1802, the mirasidar owned also the Kudivaram right.

The terms, Ekabhogam, Tunduvaram Kambatam explained.

Second Appeals against the decision of the District Court of Chingleput reversing the decision of the Sub-Collector of Chingleput.

These suits were brought by the tenants of the village of Shrothriem Thalambur against the landlords to enforce the tender of pattas on the ground that the tenants have permanent occupancy rights in the land, The Shrothriemdars in their defence alleged that they are the Ekabhogam Mirasidars, and are therefore owners of both the Melwaram and Kudiwaram, and that Revenue Courts have no jurisdiction to entertain the suit. The 1st Court found that the Shrothriem in question, (which was originally granted on Mokasa Tenure by a former Ruler of the country but which was converted into Shrothriem in 1802) was an ordinary estate, that the tenants have occupancy rights, that the Revenue Courts have jurisdiction to entertain the suits. He decreed the plaintiffs' suits with costs. On Appeal, the District Judge held that the Shrothriem does not constitute an estate within the meaning of Sec. 3, clause 2 (d) of the E. L. Act and that the Revenue Courts have no jurisdiction to try these suits. He thereupon dismissed the plaintiffs' suits.

The tenants appealed to the High Court.

T. R. Ramachandra Aiyar for appellants.

S. 185 of the E. L. Act states that every land in an estate is presumed to be ryoti land; the latter is defined in S. 3. The definition of an estate, is contained in S. 3 clause (2). The clauses a, b and c, do not apply here; (d) is the only clause that is applicable, *i.e.* where land revenue alone has been granted 'to a person owning the Kudivaram thereof'. Kudivaram is not defined in the Act. My submission is that 'owning' does not mean that the person 'owned' in the past. He must be the present holder; if he had lost the right and Kudiwaram vests in another at present then the Section applies. The tenants are now in possession of the land; they have been in long enjoyment of it, at least since 1886; they have alienated their interests by way of mortgage, lease &c. The Shrothriemdars themselves have attested many of these documents; they cannot now say that the tenants have no occupancy right.

The term 'mokasa' is defined in 26 Mad. 403 and 29 Mad. 52. All that is said is that the word may mean, an assignment of land or village on condition of service.' "Shrothriem" is defined in 24 M. L. J. 36 at 39, That also does not mean ownership in the land in the sense of owning Kudiwaram, the presumption is rather the other way: I may also refer to the presumption raised in the case of all Inams: See 24 M. L. J. 655, 656, 659. The term 'mirasi' does not help either. The word mirasi, is used in different senses; it does not necessarily mean that the present ownership vests in the mirasidars; the rights of mirasidars were long ago destroyed. Again there may be a species of sub-miras in the tenants, who are in long enjoyment of their holdings and hence they cannot be evicted. The origin of the tenancy in the village is not known but it is found that the tenants have been in enjoyment for a very long time; that is enough to bring the village under the definition of estate in Sec. 3 clause 2 (d). The Revenue Courts have jurisdiction.

L. A. Govindaraghava Aiyar for Respondents.

The suit village does not fall within the definition of an 'estate.' The mirasidars are owners of Kudiwaram interest in the land; the fact that they have parted with their rights at present is immaterial. We have to see whether they owned the 'Kudiwaram' at the time of the grant in 1802 if so, then 1910, M. W. N. 639 would apply and the Revenue Court would have no jurisdiction; 24 M. L. J. 571 does not apply because the suit there was brought in a Civil Court. As to the history of mirasi tenure in Chingleput, see Crole's District Manual of Chingleput, Mirasi Tenure, and Huddlestone's Mirasi papers. It is true that the Shrothriemdars have attested but none of the alienations by the tenants can be said to be permanent. There are no sales by them and that shows they have no disposing power over the land; the payment of Thunduvaram is significant; it is a recognition of the right of ownership of the mirasidar.

The Court delivered the following

Judgments:—*Sadasiva Aiyar* J.—These Second Appeals have arisen out of suits brought against the same two defendants. The plaintiffs in these suits are the tenants in a shortriam village called Talambur in the Chingleput Taluq. The plaintiff's case in each suit is that the shrotriam Inam comes under the definition of 'Estate' in the Madras Estates Land Act, and the plaintiff is the occupancy tenant of the lands entered in the A schedule to the plaint and that the plaintiff is entitled to demand from the defendants a pattah containing the terms stated in the "model" pattah forming the B schedule to each plaint. The defence of the two defendants who

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are shrotriamdars, is that the plaintiffs have no occupancy rights, that the defendants own both the Melvaram and the Kudivaram rights in the lands in the plaint village, that the village is not an 'estate' under the Madras Estates Land Act, that the provisions of that Act do not apply to the suit lands and that the plaintiffs are not therefore entitled to demand pattahs from the defendants. As regards also the terms to be entered in the pattahs, there was dispute between the plaintiffs and the defendants. The Sub-Collector of Chingleput decided the suits substantially in the plaintiffs' favour, though in respect of the rents to be paid by the plaintiffs, he decided in favour of the defendants' contention, namely, that the plaintiffs were bound to pay waram or share of produce (forty per cent. of the produce) as rent and not money rents as contended by the plaintiffs. On appeal, the learned District Judge held that the defendants were not only Shrotriamdars but also Mirasidars of the village that while they owned the Melwaram of the village as Shrotriamdars they owned the Kudivaram as Mirasidars, that the plaintiffs had no occupancy right, that the village was not an *Estate* under S. 3, cl,(d) of the Estates Land Act because the persons to whom the land revenue was granted as Shrotriam Inam by the Government did own the Kudivaram thereof as Mirasidars and that hence the Madras Estates Land Act did not apply to the lands in the village and no suit could be brought under that Act by the tenants to enforce the grant of pattas. On these findings he reversed the Sub-Collector's decisions and dismissed the plaintiffs' suits with costs. The plaintiffs have therefore brought these Second Appeals contending that the village is an "Estate" under the Madras Estates Land Act and that the plaintiffs have occupancy rights. I think the decision of these cases depends on the answer to the question whether, when the Government granted the Melvaram as Shrotriam Inam to the predecessors-in-title of the six defendants the grantees owned the Kudivaram in the village lands or whether there existed at that time tenants with occupancy rights who owned the Kudivaram in the lands in dispute.

These Second Appeals have been fully and ably argued by the learned vakils on both sides and we have been taken through not only the documentary evidence adduced by both parties, but even through much of the oral evidence. The Melvaram of the village seems to have been first granted as Poliagar service Inam by a former Government, probably the Nawab of Arcot, in the 17th century to a person whose family was known as Pothi Reddi family. The evidence further seems to show that Pothi Reddi Nayakan who

became the poliagar was known as the Ekabogam Mirasidar of the village and hence must have owned at one time the Kudivaram right in all the village lands.

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Now the Mirasi system in the Chinglepat District began, according to the traditional authorities, by the act of a Chola king named Kulothunga, whose illegitimate son Adanda conquered the country round Canchipuram. The date of this conquest is variously given as between the eighth and twelfth centuries. The grantees of lands under the Chola king in Mirasi right were all Vellalas. It was intended that they should bring the lands in the villages which were mostly of poor quality under cultivation through their own exertions or through the exertions of Payakaris who were to be settled by the Mirasidars, known in the Hindu Period as Kaniakshikar. The Mirasidar was not expected himself to cultivate the entire area of cultivable lands in the village. The Payakaris whom he introduced for cultivation purposes, if they permanently settled in the village and if they and their descendants enjoyed the same lands as tenants for about 100 years, became by custom and by Hindu Law, Ullkudi Payakaris with permanent rights of occupancy, that is, they acquired what may be called in one sense the Kudivaram right in the lands in their holding. Though they thus acquired permanent occupancy rights, the original Mirasidar who had obtained the Kudivaram from the Government was entitled to demand from the Ullkudi Kudivaramdar some Swatantrams including what was called Thunduvaram, the amount of which swathantrams was a certain proportion of the gross produce raised by the Ullkudi tenant. These swathantrams might be looked upon as a fraction of the fruits of the Kudivaram right, which fraction can never be lost by the Mirasidar. Forty per cent being the Melvaram share and sixty per cent. the Kudivaram share, the Ullkudi Kudivaramdar did not take the whole sixty per cent. for himself but gave out of it a percentage as swathantrams to the Mirasidar even after he, the Ullkudi, had obtained the permanent occupancy right in the lands. The above is the conclusion which I have arrived at after anxious consideration of the arguments on both sides and after perusal of the passages in Huddlestone's papers on Mirasi rights and Crole's Chingleput District Manual and other authorities. (See Huddlestone' Mirasi papers, pages 176, 214, 372, 379 to 384, 395 and 45; Chingleput District Manual, pages 110, 138, 312, 213, 300 to 193, 394 and 395).

Though the Ullkudi Payakari tenant seems to have obtained a sort of permanent right of occupancy by continual residence in the village and by cultivation of the same lands for three generations,

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it appears very doubtful whether he could be held to have acquired in former times what is now known as the Kudivaram rights in the lands in his occupation. At page 214 of Mr. Huddlestone's Mirasi papers it is said " the Ullkudi, on the contrary, holds his lands in a subordinate species of Mirasi and possesses in them no *absolute* but indefinite property; for, though he cannot transfer them by sale, gift, mortgage or otherwise, yet he cannot be removed from them and they descend like the Kaniyakshi Mirasi of the village to his posterity; he pays the Sirkar Revenue, the Thunduvaram—often no more than a pepper corn—and all dues rendered by the Mirasidars and Puracudis, but he receives none. The Ullkudi Payakaris have, in many places, by gradual encroachment, succeeded in placing themselves in possession of the whole *varapat* of the village and not infrequently in usurping the Mirasi right: there is a remarkable instance within the limits of Madras of complete usurpation, in which the Gramini Payakaris of the village of Tondiyarpet, after the continued contention of half a century have established themselves in possession of whole Mirasi, though under a decision of the Supreme Court their right has been negatived and "they are liable to ejectment, on further process." The question of Mirasi right is a very contested matter. I shall just quote a few passages from Crole's Chingleput District Manual, page 214. "The question of Mirasi right is without doubt one of considerable difficulty. No proof of this is more conclusive than diametrically opposite opinions regarding it which have been ventilated and upheld by officers of vast ability from the very commencement of our administration. The Madras Government has itself at various times passed orders containing *dicta* utterly irreconcilable, one with the other, while the Board of Revenue although on the whole more consistently supporting the claims of Mirasidars (Kaniyatchikars) has in hardly any single instance been at one with the Government in the many discussions on this question which have now attained such bulk as to supply *Mirasi right* with a literature of its own equalled in point of ability and learning by that of few of the many other great and intricate subjects which have from time to time engaged the attention of Indian Administrators." In going over the bulky reports, proceedings minutes of consultation, and "orders thereon" not to mention the despatches of the East India Company, nothing strikes the reader more strongly than the change which has come over the nature of the right itself ever since the District was first handed over to the Company. During that period, many portions of the right at one time inherent in it have disappeared owing to the changes produced by flux of time and the altered

conditions of the country, while others have been expressly abrogated by Government itself yet this seems generally to have been overlooked and additional perplexity has been thus imported into the discussions of a subject already sufficiently intricate and obscure.'

The literature on this subject was recently added to by the pronouncement of my learned brother, Sir *C. Sankaran Nair* J., in Second Appeal No. 210 of 1911. I also contributed my humble quota in that case by a separate Judgment. By our Judgments we have referred the question to a Full Bench and I therefore do not intend to say anything in this case as to the present right of Mirasidars in Ryotwari villages.

What however, we have to consider in this case is, whether in 1802, the Ekabogam Mirasidar of the plaint village in the Chingleput Taluk owned the Kudivaram right or whether there were Ullkudi Payakaris then, who could be deemed to have acquired the full Kudivaram rights of that time. I must frankly confess that I was at first rather inclined to hold that the Wullur Sukawasi tenants mentioned in the varachattam of 1772, Ex. LV, might have acquired full Kudivaram rights in 1772 itself and that in any event, they might be presumed to have acquired full Kudivaram right at the time of the Shrotriam grant in 1802. However, after I had recorded a portion of this Judgment I had the great advantage of a perusal of the Judgment prepared in this case by my learned brother and I began to feel doubts about the soundness of my view. It seems to me now that a person cannot be held to own the Kudivaram right in its true and complete sense unless he has also got the power of alienation of his right of occupancy and unless he does not acknowledge himself to be merely the tenant of a person really owning the Kudivaram right. The documentary evidence in this case seems to show that even for several years after 1802 the occupancy tenants of the lands in this village did not claim rights of alienation of their occupancy tenure and that he acknowledged the Shrotriamdar as Ekabogam Mirasidar, that is, that he was the owner of the Kudivaram right in the lands in the village. That even the sub-tenant of a Kudivaram owner might acquire a permanent occupancy right in his sub-tenure has been held by *Benson* and *Sundara Aiyar*, JJ., in *Venkatachala Goundan* v. *Rangaratnam Aiyar*[1]. If it were necessary to decide the question in this case as to whether the plaintiffs have now obtained permanent rights of occupancy intheir lands, I would, speaking for myself, feel great difficulty in concurring with the learned District

1. (1913) 24 M. L. J. 671.

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Judge (see paragraph 6 of his Judgment) that the plaintiffs have no occupancy rights having regard to the considered observations in 24 M. L. J., 571. But the only question on which it is necessary to express a finding in this case is, as I said before, whether in 1802 the grantee of the Shrotriam Inam had lost the Mirasi rights by the ullkudi tenants having set up in themselves and enjoyed the Kudivaram permanent occupancy rights, in the full sense, for the required period. As regards inamdars, I think or rather, I hope, that in this Court it has been now settled that the presumption is that at the time of the Inam grant, the Inamdar was not the owner of the Kudivaram right notwithstanding the observations in *Indety China Nagadu* v. *Potu Konchi Venkatasubbayya*[1] and *Marapu Tharalu* v. *Telukula Neelakanta Behara*[2] from which I have expressed dissent in my Judgment in the recent cases, *Suryanarayana* v. *Potanna*[3]. But as regards a Mirasidar to whom an Inam was granted long ago, it cannot be said that there is a presumption against his having also owned the Kudivaram right at the time of such an ancient grant having regard to the history of the Mirasi tenure in the Chingleput District. Whether a Mirasidar in the modern period, that is after 1878, has the Kudivaram right in the waste lands in his village not included in his patta or in the communal sites, is another question. But whether he should be presumed to have lost his Kudivaram right in cultivable lands in 1802 is quite a different question. After anxious consideration I am glad to find myself able to concur in the opinion of my learned brother that the finding of fact by the learned District Judge, limited to the following statement, namely, that the Ekabogam Mirasidar of the plaint village had not lost his original kudivaram rights in the village cultivable lands at the time of the grant to him in 1802 of the Shrotriam Inam, should not be disturbed by us in second appeal.

On that finding the Inam does not fall under the definition of an 'Estate' under section 3, clause 2(d) of the Madras Estates Land Act and the plaintiffs had no right to bring suits to enforce the grant of pattahs. The right to enforce the grant of pattahs being the right created by a particular statute (Sec. 55 of the Estates Land Act) to be enforced in a particular class of courts, the civil courts have no jurisdiction to entertain such suits. The second appeals therefore should be dismissed with costs; but as I said before, it should not be taken by the defendants that these cases have decided the question of the alleged permanent occupancy rights of plaintiffs in their respective holdings.

1. (1910) M. W. N. 639. 2. (1907) I. L. R. 30 M. 602.
3. (1913) 26 M. L. J. 99.

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Spencer J.:—The plaintiff brought this suit in the Court of the Sub-Collector of Chingleput under Sec. 55 of the Madras Estates Land Act to compel his land-lord to grant him a patta admitting his right of occupancy in the land cultivated by him. The Sub-Collector found that the plaintiff was entitled to such a patta and gave him a decree accordingly. In appeal, the District Judge decided that the plaintiff had not proved that the occupancy right lay with him. The Judgment goes further and finds that the land concerned in this suit is not part of an estate as defined in Sec. 3 of Act I of 1908 and therefore, that the suit was not maintainable in a Revenue Court.

The village of Talambur in the Chingleput District appears to be held by the defendants on Shrotriam tenure. Exhibit II is the original *purwanah* or grant, dated 1802. From this it appears that the village was previously held on *mokhasa* tenure on condition of rendering police services. When the *mokhasa* was converted into Shrotriam in 1802, the services were dispensed with and a money rent was substituted. Afterwards in 1862 the Shrotriam was enfranchised and the title-deed, which is Ex. IX, was granted to the holders.

As the respondents have taken the objection in their written statement that this village is not an estate within the meaning of the Act and as the District Judge has found this point in their favour, it becomes necessary for us to decide, in the first place, whether at the time of the original grant the defendants' ancestors were in the eye of Government, persons already owning the Kudivaram. Mr. Govindaraghava Aiyar for the respondents has strenuously maintained that in the Chingleput District, Mirasi rights carried with them the right of occupation.

In *Narayanasami Naidu* v. *Secretary of State for India*[1] the meaning of ' Shrotriam tenure ' is considered and the definition of Shrotriam in Wilson's Glossary is quoted to show that a Shrotriam grant gives no right over the lands and the grantee cannot interfere with the occupants as long as they pay the established rents." Properly speaking Shrotriam consists of lands or a village held at favourable rate, the land or the revenue being assigned to a Brahmin, or to servants of the Government as a reward for past services. In *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur*[2] the meaning of the word *mokhasa* is discussed. The definition given in Wilson's Glossary is quoted to show that it is derived from an Arabic word signifying ' to have

1. (1912) 24 M. L. J. 86, at p. 89 2. (1906) I. L. R. 29 Mad. 52, 55

as one's own' and that it means "a village or land assigned to an individual, either rent-free or at a low quit rent, on condition of service."

The grant of the Shrotriam being a grant by Government of a portion of their Melvaram rights to persons already in occupation of the land, a presumption appears to arise that the persons in occupation were, previously to the grant, owners of Kudivaram right. If they were not Kudivaramdars previously it is difficult to understand on what right they were occupying the village. In this connection Ex. IV is a very important document as it purports to be a *varachattam* or settling of rent for the year 1772, thirty years before the Shrotriam grant was made under Ex. II and shortly after the British Administration began, which dates from 1760 according to the District Manual, page 229. From Ex. IV it appears that two persons, Pothi Reddy and Venkatakristnama Naicken, who are described as kaniyakshi, were cultivating Kambattam or home-farm—land and that the other land in the same village was being cultivated by ryots who are described as Ullur Sukavasis. It also appears that out of the total yield of 100 kalams of grain, the Government took 34 kalams 5 marakals and 4 measures as their Melvaram after making all deductions. An important feature of this document is that Kambattam lands and lands cultivated by Sukavasis are put on the same footing. In Wilson's Glossary, at page 492, 'Sukavasi Kudiyan' is defined as one "who lives by the produce of the rented lands" *Kaniyakshi* is the proprietor, from Kani, the Tamil for land, and 'adsi' 'andel' owner, lord. *Kaniyakshi* became afterwards known as Mirasidar (see pages 211 and 216 of the Chingleput District Manual). Mirasidars had a right to receive *Thunduwaram* or short assessment on all produce raised on lands in the occupation of non-Mirasidars (page 220). Thunduvaram is defined at page 265 as the fixed percentage of the Kudivaram which by agreement or custom was due to the Mirasidars on all lands cultivated by *Payakaris.* At page 223 the opinion of Mr. Place that the Mirasidar had an undoubted hereditary property in the soil which he derived originally from the sovereign is quoted. In the papers on Mirasi right compiled by Government in 1862, Kaniyakshi is described at page 372 as "free hereditary property in the land." *Mirasi* is the name by which it came to be known, a word of Arabic derivation introduced by the Mahomedans soon after their conquest of the Deccan and denoting hereditary property in general. *Mirasi* is defined by Mr. Ellis at page 176 as a general term used to designate a variety of rights, all more or less connected with the proprietary possession or usufruct of the soil or of its

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produce and by Sankarayya in similar terms at page 218. *Thundu varam* is defined at page 380 as that which remains to the Mirasidars of the rent paid by the *payakaris* after the liquidation of the land tax. If the Mirasidars failed to cultivate for a year, the Mirasi right was not forfeited to the sirkar, but the Government could select a tenant and confirm him in possession by issuing a cowle (pages 221 and 384). It thus appears that the Mirasidar was the person who got lands cultivated and let tenants into possession. In Sir Thomas Munro's minute, the right of a Mirasidar to cultivate the land is recognised. It is also noted that if he fails to pay the public assessment his land is liable to sale but the Mirasidars possessed the privilege for some years more or less of recovering his land from the tenant let in by the Government on his consenting to pay the rent. The history of *Mirasi* tenure after the British occupation appears in pages 300 to 303 of the Chingleput District Manual. Their privileges were continually encroached upon but it appears that these encroachments did not commence before the 19th century. In 1802 when this *Shrotriam* grant was made, there is thus every reason to presume that the Mirasi right in the defendant was unimpaired. Mr. Baden Powell in his book on the Indian Village Community observes at page 365 that there cannot be the smallest doubt that, if the *Mirasi* village claims were anything at all, they were claims which originally, at any rate, constituted the holders jointly according to their shares, the proprietors of the villages exactly as much co-sharers were in other parts of India.

At page 369 he states: "The produce, if there is no Mirasi class, is simply divided into the *Melwaram*, the state share, and the Kudivaram or occupant's share, that is to say, after the fees (*Meras*) or the village servants, watchmen, etc., etc., have been satisfied out of the grain heaps When there is a body of *Mirasi* proprietors, then there are *three* instead of *two* to share. *Melvaram*, as before, is the Royal share; *Thunduvaram* is the landlord's, as before. This division of the varam into three portions is well recognised in the judgment of *Collins*, C. J., and *Muthuswami Aiyar*, J., in *Chidambara Pillai* v. *Thiruvengadathiengar*[1] but the proprietor's share is there called Miras waram instead of *Thunduwaram*. This *Thunduwaram* or *Mirasi* waram being paid by the *payakaris* to the *Kaniyakshdar* or *Mirasidar* out of the *Kudivaram* raised upon lands leased out for waram and the Mirasidar taking the whole of the *Kudivaram* for his pannai lands cultivated by his own labour and the labour of farm-servants who were paid wages in grain, it is

1. (1896) 7 M. L. J. 1

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plain that the Mirasidar of such a whole village cannot be described as a person not owning the *Kudivaram* in 1802. For the purpose of considering who was the owner of the Kudivaram in a village of the class of the four villages granted as Shrotriam under Exhibit II it is necessary to treat the village as a whole, for the portions of estates or of villages which under S. (3) (2) (b) and (c) are not portions of villages falling under (d) class. In Exhibit V an ancient cadjan without date, Pothi Reddi and Venkatakrishnama Naicken appear as *gramathars* or villagers, which appears to have been an equivalent to *Mirasidars*. It is significant that in the chittas (Exhibit XI series) a deduction is made for *Thunduvaram* not only in the Kambatham lands of the Shrotriamdars in pattas 1 and 2 but also in the fifth patta, which contains lands cultivated by one of the other ryots of the village. It is right to receive Thunduvaram that distinguishes the Mirasi ryots from the other Payakari ryots of the village. It is a symbol of this Kudikani right. It appears to represent an acknowledgment of the cultivator that the Mirasidar has the power to disposal of the lands in the village. Later, in Exhibits A, VI and XVI the village is described as *Ekabogam Miras*, which means an original *Miras* not divided into several pangus or shares. Unlike the case of some Shrotriams, it is clear that here the original grantees were not Brahmins and that they were cultivating as many village lands as they could by their own labour and the labour of their farm sevants and giving out the rest to *payakaris* as under-tenants. Exhibits IV mentions the quantity of grain that goes to the *padiyal*. It also mentions that a certain quantity is given to the ryot. The word *Kudivaram* may be used in two senses (1) the right of occupancy, (2) the share of produce which the cultivator, whoever he may be, actually gets. Here it is used in the latter sense. In section 3, Cl. (2) (d) of the Act it is used in the former sense. There is nothing to show that this *Kudi* or ryot had the right of *Kudivaram or Kudikani* of the village. In fact, the respondents have not attempted to show how the tenants came into possession of their lands. It is possible and even probable that they have since acquired occupancy rights; but in 1802 I consider that the probabilities were that the Mirasidar had the Kudivaram right. The pattas show that the Mirasidars were cultivating part of the village as *Kambattam* and the rest through *Sukavasis*. The fact that the *Sukavasis* were termed *Ullur Sukavasis* means that they were residents in the village as distinguished from *Purakudis* brought from other villages. (See page 212, Chingleput District Manual). In *Chidambara Pillai* v. *Thiruvengadathaiengar*[1], the

1, (1896) 7 M. L. J. 1.

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Mirasidar was recognised as having a title to the Mirasi waram as distinguished from *Melvaram* or Government share of the produce, and it is observed by *Muthuswami Aiyar* J., "Ordinarily the Mirasidar or proprietor in taraf village has the right of cultivation also and he is therefore at liberty to arrange for it from time to time either by granting leases or letting it to *parakudis* for warm or under what is usually called *pannai* system by means of labourers who are paid wages in grain." This must be regarded as an authority on the customary rights of the Mirasidar class even in a non-taraf village when the Mirasidar has come to hold the whole village by virtue of a grant, in addition to his original *Miras*. In *Venkatachala Goundan* v. *Rangaratnam*[1] which follows the decision in *Veerana Ambalam Peria Kampalam Ambalam* v. *Annaswami Aiyer*[2] and also in *Krishnasami* v. *Varadaraja*[3] occupancy right was found to exist in the tenants under certain Mirasdars in ryotwari villages. But these were cases of land-holders suing in a Civil Court to eject their tenants on the ground that they had now no occupany rights. The burden of proving that the plaintiffs had a right to evict lay heavily on them. The observations made by the learned Judges who tried those appeals are applicable to the particular facts that appeared in the findings and evidence in those cases. In the particular circumstances of the present case I find nothing to negative the presumption that the Kudivaram right existed at the commencement of the nineteenth century in *Kaniyakshidars* or Mirasdars who held the Mokhasa subsequently converted into a Shrotriam village. I am, therefore, of opinion that that the District Judge was right in dismissing the suit on this ground. The Sub-Collector did not pronounce an opinion on this point.

Suits to compel acceptance of pattah could not be brought in an ordinary Civil Court. Therefore the plaints could not be returned for presentation in the proper Court and they were rightly dismissed The present appeal must be dismissed with costs.

In this view of the case, I find it unnecessary to express an opinion whether the plaintiff or his predecessors acquired occupancy rights subsequent to the original grant of the Shrotriam which was the subject of much able argument. I consider it advisable to express no opinion on this point as it may be the subject of further litigation in a Civil Court at some time or other.

S. A. 1717 to 1756 will follow this Judgment.

Appeal dismissed.

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1. (1913) 24 M. L. J. 571

2. (1911) 24 M. L. J. 845

3. (1880) I. L. R. 5 M. 345

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Iyer.

Thiruvengada Mudali *Petitioner (5th accused.)*

Cr. P. Code S. 162—Copies of Statements to Police—No right to get copies unless Magistrate considers inexpedient to grant—Can obtain only if the Magistrate considers it expedient to grant.

Thiruvengada Mudali *In re.*

Under S. 162 Cr. P. Code, it is only if the Magistrate considers it expedient in the interests of justice to grant copies of statements made to the police that the accused can obtain copies of such statements. It is not correct to say that unless the Magistrate says that it is not expedient in the interests of justice to grant copies to the accused the accused is entitled to get the copies.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Sessions Court of Chingleput in Criminal Appeal No. 25 of 1913 confirming the conviction and sentence by the Deputy 1st Class Magistrate of Saidapet in Calendar Case No. 120 of 1913.

Osborne and *P. R. Narayanasami Aiyar* for petitioner.

The Court made the following

Order:—Though if the prosecution case is wholly true or the defence is wholly true, there could have been only one occurrence and either the occurrence now charged must be false or the counter-case in which some of the prosecution witnesses in this case were convicted must have been false, the learned Sessions Judge's opinion that both the occurrences are true cannot be said to be an illegal finding as each of the two contending parties would naturally try to make out that the only occurrence that took place was the only one in which their party received injuries.

As regards the statements made to the Police, "the court" (under Section 162 (1) of the Criminal Procedure Code) "may, if it thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof." Here, all that appears is that the Magistrate refused to furnish a copy of such statements to the accused. I must take it that he did not consider it expedient in the interests of justice, to direct copies to be furnished. The accused is not entitled, as of right, to be furnished with any such copies and (as I understand Section 162) it is only if the Magistrate considers it expedient in the interests of justice to grant such copies that the accused can obtain or use such copies. I do not think that *Dadan Gazi* v. *Emperor*[1] or *Salt* v. *Emperor*[2] is against this view of mine,

*Cr. R. C. No. 57 of 1914 • 23rd January 1914
(Cr. R. P. No. 49 of 1914)

1. (1906) I. L. R. 33 C. 1023 2. (1909) I. L. R. 36 C. 560.

and I do not accept the argument that unless the Magistrate says that it is *not expedient* in the interests of justice to grant copies to the accused, the accused is entitled to get such copies or use them as evidence.

Thiru-vengada Mudali *In re.*

I reject this petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

Present:—Sir Arnold White Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

Churiya Kurnum — *Appellant.**

v

Thakarie Chiruthan and others — *Respondents.*

Malabar Tenants Improvements Act (Madras Act I of 1900) Ss. 3, 5—Tenant introduced by mortgagor after mortgage—Purchaser in execution of decree upon mortgage—Right to improvements against—Right of tenant to improvements not confined against lessor.

A tenant introduced into the land by the mortgagor after executing the mortgage, is entitled on eviction by the purchaser in execution of the decree upon the mortgage to the value of improvements effected by him while on the land.

Churiya Kurnum *v.* Thakarie Chiruthan.

The right of the tenant under S. 5 of the Malabar Tenant's Improvements Act to claim improvements is not limited to his lessor.

Appeal under clause 15 of the Letters Patent presented against the judgment of the Hon'ble Mr. Justice Sundara Aiyar and the Hon'ble Mr. Justice Sadasiva Aiyar in S. A. 1271 of 1911 preferred against the decree of the District Court of North Malabar in A. S. No. 361 of 1910 (O. S. 563 of 09 on the file of the Court of the District Munsif of Tellicherry).

C. V. Ananthakrishna Aiyar for Appellant.

V. Ryru Nambiar for Respondents.

The Court delivered the following

Judgment.—The question for decision is whether the defendants, tenants, holding under the mortgagor, the 1st defendant, are entitled to get the value of improvements made by them on eviction by the purchaser in execution of the mortgage decree obtained by the plaintiff. We proceed on the footing that the lease to the defendants is subsequent to the creation of the mortgage. The plaintiff's case is that it was not open to a mortgagor to create any right in derogation of his

* L. P. A. No. 287 of 1912 · 7th January 1914

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mortgage. The defendants claim the value of the improvements under the Madras Act I of 1906. S. 5 of that Act declares the right of every tenant to receive compensation for improvements on ejectment. It is argued that this section entitles the tenant to receive compensation only from his lessor. There is no such restriction in the section itself. The definition of the term, (See S. 3) shows that it includes persons other than those included in the word as defined in the Transfer of Property Act and includes persons who did not enter into possession under any agreement with, or with the consent of, the person entitled to obtain possession of the property. The customary law leaves no doubt on the point.

In Major Watkin's Report on the land tenures of Malabar (1801) a recognised authority it is stated "should there be a paramba without any known owner and a Kudian (tenant) believing that it was without a master settled on it and made considerable improvements, on the return of the Jemkar or any one producing sufficient proof that he was the owner of the paramba the Kudian must in that case without dispute accede to the demand provided the Jemkar pays *kulikanom* or the value of the improvements."

Accordingly the 'tenant' according to S. (3) includes any person who enters into possession of waste land without the consent of the owner but with the *bona fide* intention of paying the customary rent to the owner when ascertained. Similarly the holders of lands under cowles granted by Government received before the passing of the Act the value of improvements on surrendering the land to the Jenmi: so also tenants holding under invalid Kanoms, leases or mortgages granted by the Karnavan when surrendering the lands to the tarward tenants let into possession by a person claiming Jenm title on eviction by the person to be the true *Jenmi* of the land also received compensation. The section accordingly defines tenants to include mortgagees as well as persons who in good faith believed themselves to be mortgagees or tenants. It is clear therefore that the defendants who are in possession as tenants under the mortgagor are "tenants" within the definition and accordingly entitled to get compensation for improvements on eviction. It is not contended before us that the defendants are entitled to hold possession against the purchaser. The decrees of the Lower Courts which direct the sale of the defendants' interest in the property will be modified by ordering the sale of the property subject to the right of the defendants to receive compensation for value of improvements. With this modification the decree is confirmed and the appeal dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Lingam Krishna Bhoopathi Deo Garu — *Appellant (Defendant.)*

v.

1. The Honourable Sri Mirza Sri Pusapati Raja of Vizianagaram, 2. Kovvuru Basavi Reddi Garu. — *Respondents (Plaintiff) and Transferee decree-holder.*

Lingam Krishna Bhupathi *v.* Raja of Vizianagaram.

Spencer J.

Privy Council decree—Execution of—Power of Court executing—Recognition of transferee of decree by, if competent—Order 45 r. 15 and 16—Power of Attorney—Construction—Principal and Agent—General power to manage Zamindari—Power to transfer decree in favour of estate.

The Court of the first instance to which a decree of the Privy Council is transmitted by the High Court for execution has power to recognise transfer of the decree and permit the transferee to execute without directions from the High Court in that behalf.

General power to manage a Zamindari "in all respects as fully and absolutely as the principal himself is empowered to do" must be held to include the power to transfer for a reasonable consideration a decree amount due to the estate.

Palaniappa Chettiar v. Arunachala Chettiar[1], distinguished.

Appeal from the order of the District Court of Vizianagaram dated 26th March 1913 in Execution Petition No. 3 of 1913 in O. S. No. 7 of 1899 (Privy Council Appeal No. 77 of 1899).

B. Narasimha Row, K. Srinivasa Iyengar and *V. Ramesam* for Appellant.

S. Srinivasa Iyengar, P. Narayanamurthi and *P. Somasundram* for Respondents.

The court delivered the following

Judgments.—*Spencer* J.:—Two grounds of appeal are pressed. It is contended (1) that the order of the District Court recognising the transfer of the decree by the Manager and agent of the estate of the Maharajah of Vizianagaram in favour of the 2nd respondent and allowing the latter to execute the decree was an order made without jurisdiction, the proper Court which should pass such an order in a case, which had gone up to the Privy Council in appeal from a decree of the High Court which confirmed the Original decree of the District Court, being the High Court;

(2) That Mr. Fowler as Attorney of the Maharajah was not expressly authorized under the Power, namely Exhibit A, to transfer decrees obtained by his principal for less or indeed for any amounts.

*A. A. O. No. 145 of 1913. 7th January 1914.

1. (1912) 23 M. L. J. 595.

Lingam Krishna Bhupathi v. Raja of Vizianagaram.

Spencer J.

No direct authority has been quoted in support of the first proposition. It is sought to be inferred from the language of Order 45, Rules 15 and 16 read along with Sections 38, 39 and 42 Civil Procedure Code. Reference has also been made in the arguments to the decision in *Swaminatha Aiyar* v. *Vaidyanatha Sastri* [1], in which it was held that an application under S. 234 of the Code of 1882 (corresponding to S. 50 of the present Code) to execute a decree against the legal representatives of the deceased judgment-debtor must be made to the Court which passed the decree and not the Court to which it has been transferred for execution; and the decision in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* [2], is cited as an instance of the High Court disposing of a similar question arising in the execution of an order of Her Majesty in Council. But in my opinion the position of an Original Court, which itself passed a decree against which appeals have been carried up to the Privy Council, when it receives the order of His Majesty in Council transmitted to it by the High Court, is not to be compared with the position of a court to which the decree of another Court has been transferred for execution. They are totally different positions.

Order 21, Rule 15 permits a transferee of a decree to apply for execution of the decree to the Court which passed it. S. 38 permits a decree to be executed either by the Court which passed it or by the Court to which it is sent for execution. S. 37 defines the expression "Court which passed a decree" as including the Court of first instance where there has been an appeal. Similar words are used in Order 45 Rule 15 where it is provided that the Court from which an appeal to His Majesty has been preferred shall transmit the order of His Majesty in Council to the *Court which passed the first decree* appealed from. The act of the High Court in receiving and filing an order of the Privy Council is a purely ministerial function (vide observation in *Premlall Mullick* v. *Sumbhoonath Roy* [3].) It is so provided that the High Court should act as an intermediary for carrying out the orders of His Majesty in Council, because the Privy Council does not deal direct with Subordinate Courts.

In the present instance the petition of the transferee decree-holder to transmit the order of the Privy Council with a prayer for a direction to bring him on record in that capacity came before a Bench of this Court, and the learned Judges who disposed of his

1. (1905) I. L. R. 28 M. 466 2. (1882) I. L. R. 9 C. 482.
3. (1895) I. L. R. 22 C. 971.

Lingam Krishna Bhupathi v. Raja of Vizianagaram.

Spencer J.

application (the Chief Justice being one of the Bench) expressly refused to make any directions. Without treating him as having *locus standi* to make the application they transmitted the order, without prejudice to his right to take and the original decree-holder's right to give an assignment of the decree in question.

In *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi*[1], the question was not one of recognising a transfer of a decree but whether one of two co-plaintiffs ought to be permitted to execute a decree without the concurrence of the other plaintiff. Their Lordships of the Privy Council refrained from deciding whether the learned High Court Judge usurped a jurisdiction which did not belong to him, although they were inclined to think he had not done so. His order was set aside on other grounds, namely that it was erroneous to suppose that a decree can only be executed as a whole and not partly by one of the plaintiffs.

I therefore find nothing irregular or contrary to law in the action of the District Court in permitting the transferee to execute the decree, nor has the original decree-holder raised any objection to his doing so.

In support of the second contention we have been referred to the case of *Palaniappa Chettiar* v. *Arunachella Chettiar*[2], and *contra* to the case of *Venkataramana Iyer* v. *Narasinga Row*.[3]

Every document must be construed with reference to its particular terms, and differently worded documents afford but little assistance for correctly construing the document concerned in this case. We have referred to the power of attorney concerned in *Palaniappa Chettiar* v. *Arunachella Chettiar*[2], and we find that the scope of the agent's powers was far more limited than that of the powers conferred under Exhibit A. The learned Judges who decided that case observed that there was no clause of a comprehensive character which would show that the principal intended to confer plenary powers on his attorney, to deal with all properties and rights belonging to him. While it is true, as laid down in that case, that established law requires a power of attorney to be construed strictly, it is also correct to hold that when an agent has a general power of attorney to act in some business or series of transactions he may be assumed to have all usual powers.

I feel no doubt that the words in Exhibit A "To conduct and manage all other the estate property, moneys, affairs and concerns

1. (1882) I. L. R. 9 C. 482. 2. (1912) 23 M. L. J. 595.
3. (1913) M. W. N. 72.

Lingam Krishna Bhupathi v. Raja of Vizianagaram.

Spencer J.

of the *Zemindari* in all respects as fully and absolutely as the principal himself is empowered to do and (subject as aforesaid) to do, perform and carry out all such acts and deeds and things whatsoever as may be considered requisite for the above purposes as amply and effectually as the principal could do in his own person if these presents had not been executed" do confer on the Maharajah's manager such plenary powers as would include the transfer for a proper purpose to another person of decrees obtained in the name of the Maharajah himself, apart from other words which occur later in the same document. I would therefore dismiss this appeal with costs.

Sadasiva Aiyar J.:—I entirely agree with the Judgment just now pronounced by my learned brother. The appellant's Vakil relied on the close similarity between the terms of Order 45, Rule 16 and the terms of the last sentence of S. 42 of the Civil Procedure Code. Order 45 Rule 16 says that orders in execution made by the Court which executes the order of His Majesty in Council "shall be appealable in the same manner and subject to the same rules as the orders of such court relating to the execution of its own decrees". The last sentence of S. 42 of the Civil Procedure Code states that the "orders of a court shall be subject to the same rules in respect of appeal as if the decrees had been passed by itself". On this similarity of wording, it was argued that just as a court to which the decree of another Court is sent for execution, cannot entertain applications under Order 21 Rule 16 or S. 50 clause (1), so, even the court of First Instance whose decision ultimately went to the Privy Council, could not entertain such applications because His Majesty's order had to be sent to it for execution by the High Court. I do not think that this argument is sound as it ignores, as pointed out by my learned brother, the principle underlying S. 37 of the Code which defines the expression "the Court which passed the decree" as including the Court of First Instance so far as the powers of that court relating to execution of the decrees passed by the appellate court are concerned.

As regards the construction of the power of attorney, Exhibit A, I think that the power to manage a big Zamindari estate must include the power to transfer for a reasonable consideration a decree amount due to the estate. Clause 24 of the power of attorney, Exhibit A, confers, in my opinion, on the manager the power to execute deeds and conveyances necessary for the purpose of effectuating such transfers as are incidental to the business of estate management.

Again, as regards the decision in *Palaniappa Chettiar* v. *Arunachella Chettiar*[1], the principal himself in the case repudiated the act of his agent as beyond the scope of his authority, whereas in the present case, the principal by his conduct ratified the act of his agent (See para 10 of the Lower Court's Judgment) and in fact it was not denied that the principal has received the purchase money for the transfer from his agent's transferee and consented to the transferee executing the decree.

Lingam Krishna Bhupathi *v.* Raja of Vizianagaram.

Sadasiva Aiyar J.

I therefore concur in dismissing the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling, and Mr. Justice Sadasiva Aiyar.

Subbiah Naicker ... *Appellant** (*2nd Counter Petitioner*).

v.

Ramanathan Chettiar *Respondent* (*Petitioner*).

C. P. C. Ss. 37, 150—Jurisdiction—Pending Execution proceedings—Court ceasing to have jurisdiction over property attached—Court having territorial jurisdiction may continue without transfer—Exparte order in execution after affixture of notice—Res judicata—Order 9 R. 13—Limitation Act art. 164, applicability of—Objection petition not treated as application to set aside exparte order.

Where pending an application for execution by attachment and sale of immoveable properties, the Court ceased to have jurisdiction over those properties.

Subbiah Naicker *v.* Ramanathan Chettiar.

Held—that having regard to Ss. 37 and 150 C. P. C., the Court which acquired jurisdiction over the properties could continue the execution proceedings without a formal order of transfer from the Court which passed the decree.

On principle, unless the authority which changes the venue, reserves the right to the Court which has lost jurisdiction to continue pending proceedings affecting the property transferred to another jurisdiction such proceedings are also *ipso facto* transferred by the change of venue to the new court, the records relating to that action becoming part of the records of the new Court.

S. 150 C. P. C. is not confined to cases where there has been a formal order of transfer under special provisions of the Civil Procedure. The section adopts the Calcutta view which held that by changes of venue made by the local government the business of a Court which loses jurisdiction over a certain area so far as it relates to cases affecting the lands in the transferred area will *ipso facto* be transferred.

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*C. M. A. No. 61 of 1913. 22nd January 1914.

1. (1912) 23 M. L. J. 595.

Subbiah Naicker v. Ramanathan Chettiar.

In the circumstances their Lordships were prepared if necessary to adopt the course taken in *Alagappa Mudaliar v. Thiagaraja Mudaliar*[1] by making an order of transfer from the Court which passed the decree.

An order in execution between parties to a suit passed ex parte after affixture of notice which the Court considered sufficient service operates as *res judicata* in subsequent stages of the execution proceeding unless set aside by appropriate proceedings.

O. 9 R. 13 as well as art. 164 Limitation Act applies to such orders as they are decrees within the meaning of the Civil Procedure Code.

In this case, their Lordships declined to treat the objection petition by the judgment debtor as an application under order 9 r. 13 for the reason that it did not bear a stamp, that it did not contain a prayer to set aside the order and also that it did not state when he had notice of the order.

Appeal from the decree of the District Court of Tinnevelly in A. S. No. 399 of 1911, preferred against the order of the Court of the Additional District Munsif of Tinnevelly in C. M. P. No. 238 of 1911 (O. S. No. 74 of 1897).

L. A. Govindaraghava Aiyar for Appellant.

B. Sitarama Rao for Respondent.

L. A. Govindaraghava Aiyar.—The District Munsif of Tinnevelly had no jurisdiction to continue the proceedings without an order of transfer from the Court of the District Munsif of Srivilliputtur. S. 37 says which Courts can execute a decree—the Court which passed the decree and the Court to which the decree is transferred. It is only where a Court ceases to have jurisdiction to execute the decree that the Court which acquires jurisdiction in that matter can execute as the Court which passed the decree. Ceasing to have territorial jurisdiction over the subject matter of the suit or attachment is not ceasing to have jurisdiction to execute; see *Panduranga Mudaliar* v. *Vythilinga Reddi*[2]. The Calcutta Court has taken a different view from the Madras Court *Latchman Pandit* v. *Maddanmohin Shye*[3], *Udit Narain Choudri* v. *Mathura Prasad*[4], *Jahar* v. *Kamini Debi*[5] though there too opinion has not been consistent; See the opinion of *Field* J. in *Kali Pado Mukerjee* v. *Dino Nath Mukerjee*[6]; *Karticknath Pandey* v. *Tiluck Dhari*[7] *Premchand Dey* v. *Mukhoda Debi*[8]. The opinion of the Calcutta Court is hardly defensible on principle. Either the Court which passed the decree or the new Court has jurisdiction to execute. How can the one that has "ceased to have

1. (1910) M. W. N. 477.
2. (1907) I. L. R. 30 M. 537.
3. (1880) I. L. R. 6 C. 513.
4. (1908) I. L. R. 35 C. 974.
5. (1900) I. L. R. 28 C. 238.
6. (1897) I. L. R. 25 C. 315.
7. (1888) I. L. R. 15 C. 667.
8. (1890) I. L. R. 17 Cal. 699.

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jurisdiction" still have jurisdiction to execute? In *Prem Chand Dey* v. *Mokhoda Debi*[1] the court had no jurisdiction over the subject matter either at the date of the suit or at the date of sale. The view taken in *Gomatham Alamelu* v. *Komandur Krishnacharlu*[2] is opposed to that in the above case. The case of *Alagappa* v. *Thiagaraja*[3] simply states the conflict. The rule as stated in the American Cyclopedia is hardly helpful. According to it the question depends upon the construction of the statute. That pending proceedings are not affected by removal of Court's jurisdiction is laid down in *Subbaraya Mudaliar* v. *Rakki*[4]. He referred to S. 6 of the General Clauses Act.

S. 150 refers to "transfer of business". That is to say, transfer under Sec. 24 C. P. C. or other sections. A transfer of business cannot mean transfer by redistribution of territorial jurisdiction.

The order is not *res judicata*. It is one passed *ex parte*. There is nothing to show that the defendant had notice or had opportunity to contest. That is necessary for the order to operate as *res judicata*-*Hara Chandra Bairagi* v. *Bepin Behari Das*[5]. Order 9 r. 13 cannot apply to execution proceedings. S. 141 does not apply to execution proceedings. Though the word (decree) would include order passed in execution still the words of the rule exclude the application of the rule to orders in execution. See *Thakur Prasad* v. *Sheik Fakir Ullah*[6] *Balasubramania Chetti* v. *Swarnammal*[7] *Asim Mandal* v. *Raj Mohan Das*[8]. Art. 164 of the Limitation Act also is inapplicable, having regard to the words used in that article. Assuming that an application is necessary to set aside the order, the objection.petition by the judgment debtor might be regarded as such petition and inquiry directed upon it. *Mochai Mandal* v. *Mesuruddin Mollah*[9].

B. Sitarama Rao for respondent relied upon *Zamindar of Vallur* v. *Adinarayudu*[10] and S. 150. The analogy of S. 6 of the General Clauses Act S. 189 of the Estates Land Act and of the Small Cause Courts Act, cannot apply where the local government alters the territorial jurisdiction of the Court. No taking away of the Civil Court's jurisdiction is involved in such proceeding. Only a different Court is provided. The wording of S. 37 indicates that territorial jurisdiction in the Court is a condition for execution. The language of S. 150 covers the present case. The view of those American Courts that hold that pending proceedings also are

1. (1890) I. L. R. 17 C 699.
2. (1908) I. L. R. 27 M. 118.
3. (1910) M. W. N. 477
4. (1908) I. L. R. 32 M. 140
5. (1909) 13 C. L. J. 38
6. (1894) I.L.R. 17 A. 106 s.c. 22 I.A. 44
7. (1918) 25 M. L. J. 367
8. (1910) 15 C. L. J. 532
9. (1910) 13 C. L. J. 26
10. (1896) I. L. R. 19 M. 445

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affected is on principle the correct view. The rule enacted by S. 6 General Clauses Act dates after the Interpretation Act 1889 in England. See Maxwell page 670 *et seq.* Order 9 r. 13 applies to orders in execution. See *Krishna Chandra Pal* v. *Protap Chandra Pal*[1]. It is a principle of general law that an order or judgment passed after defective service of notice operates as *res judicata* unless set aside by appropriate proceedings; Bigelow p. 225. Black on judgment Vol. 1 p. 245, 255 263. The objection petition does not bear a stamp, does not contain a prayer to set aside the order, nor does it state when he came to know of the order,

The Court delivered the following

Judgment:—The 2nd defendant, one of the three judgment debtors, is the appellant before the Court. This appeal has arisen out of an execution petition put in by the decree-holder. The facts are a little complicated, and though, it is not necessary to detail all the facts, it is necessary to set out the following for understanding the contentions on both sides.

The decree in this case was passed so long ago as March 1898 in favour of one Arunachallam Chettiar. There were several execution petitions by the said decree-holder himself. The decree is then alleged to have fallen in a partition between two members of the decree-holder's family and partners of a family firm to the share of one partner who also held a power of attorney from the decree-holder. This partner filed execution petitions in 1905 and 1907. Finally on the 21st April 1909, E. P. No. 389 of 1909 was filed by a next friend on behalf of the minor son of the said partner after the death of the latter.

We must here state that the decree was passed by the District Munsif's court of Sriviliputtur and all these applications including the E. P. No. 389 of 1909 of 21st April 1909 were instituted in that court. On this application 389 of 1909, notice was ordered to be issued to defendants to show cause why the decree should not be executed by sale of properties which had been attached long ago and which attachment was still subsisting. For the purpose of this appeal, it is necessary only to consider the notice issued to the 2nd defendant, that notice having been issued in July 1909 by the Srivilliputtur Munsif's court for the 2nd defendant's appearance on 10th August 1909 to show cause against execution. The process server took the notice to the second defendant's village on 31st July 1909 for service on the 2nd defendant. What took place there appears from the endorsement of the Village Munsif on the

1. (1906) 3 C. L. J. 276

process server's return and that endorsement is as follows:—"On enquiry made on 31st July 1909 at 9 A.M., regarding the 2nd defendant, the females in the 2nd defendant's house and the inmates of the adjoining house state that it is two days since he went to Sankaranainar Koil, that the date of his return is not known and that no proper male heir is present on the spot; the duplicate of the notice to the said 2nd defendant is affixed to the front door of the house." With a return to this effect, the process server returned the notice to the court on the 6th August 1909. On the 10th August 1909 (which was the date fixed in the notice for the 2nd defendant to appear to show cause,) the District Munsif made a record to this effect "Notice affixed, defendant absent, adjourned to the 14th instant for batta for proclamation." (The learned District Judge, seems to have thought that the 10th August 1909 was a mistake for the 10th December 1909 but it seems that there is no such mistake and the order was really passed on 10th August 1909 by the Munsif. On the 18th October 1909, the proclamation was settled and the sale date was fixed, for 10th December 1909. The sale fixed for 10th December 1909 seems to have been again adjourned to some other date in 1910 on account of certain other proceedings which it is unnecessary to detail.

In May 1910, the Ramnad District was newly constituted by the Local Government and the Srivilliputtur District Munsif's Court was placed under the Ramnad District Judge. The properties which had been attached by the Srivilliputtur District Munsif in execution of the decree of 1897 came under the jurisdiction of the Additional District Munsif of Tinnevelly, having been taken away from the Srivilliputtur District Munsif's jurisdiction. On these facts, the next-friend of the minor who claims to be the decree-holder (we shall call him "Respondent") and who had put in the E. P. No. 389 of 1909 in April 1909 in the Srivilliputtur District Munsif's court put in M. P. No. 333 of 1911 in the Additional Munsif's court of Tinnevelly praying among other things that the execution proceedings instituted in the Srivilliputtur Munsif's court in April 1909 might be continued in the Additional District Munsif's court of Tinnevelly after obtaining all the records from the Srivilliputtur court. The 7th and 8th paragraphs of the affidavit accompanying this petition of February 1911 are as follows:—

"7. As the properties which are mentioned in the said sale proclamation and which are applied for being sold in this suit are situate in Kurivikolam Katu Kuthagai, Kurinjakulam village in Sankaranainar Koil Taluq within the jurisdiction of this court as the

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Srivilliputtur Munsif's court in which steps had been taken before this, has been abolished in so far as this district is concerned, as the said court has lost its jurisdiction in matters of execution in respect of the decrees of this district and as this court itself has now jurisdiction to execute the decrees connected with this district it is necessary and reasonable to continue and execute through this court itself the petition pending in the said Srivilliputtur Munsif's court."

"8. Moreover, this plaintiff made an application to the said Srivilliputtur Munsif's court but the said application has been returned with an endorsement stating *that the entire records aforesaid* have been sent to this court, with reference to matters stated in para 6 above. The application so returned is herewith filed." The Additional District Munsif dismissed this application. The conclusions he came to are (as we understand them):—

(*a*) the decree of the Srivilliputtur District Munsif's court was not transferred to the Additional District Munsif's Court for execution though a portion of the records were sent to the Tinnevelly Additional District Munsif's Court on the transfer of the territorial jurisdiction by the District Munsif of Srivilliputtur himself.

(*b*) the District Munsif's court of Srivilliputtur has not ceased to exist nor has it ceased to have jurisdiction to execute its own decree on the transfer of territory from its jurisdiction as such transfer did not take away the jurisdiction to entertain application for execution and to pass orders thereon which it had under section 223 of the Civil Procedure Code.

(*c*) the Additional District Munsif's Court of Tinnevelly did not acquire the jurisdiction to execute the decree under S. 649 of the old C. P. C. or S. 150 of Act V of 1908 because the Additional District Munsif's court of Tinnevelly could acquire the jurisdiction, *only* if the court of the District Munsif of Srivilliputtur ceased to exist or to have jurisdiction to execute the decree.

(*d*) the exparte order passed by the Srivilliputtur District Munsif's court on the 10th August 1909 allowing execution to proceed against the 2nd defendant because he did not appear though held to have been duly served could not be treated as estopping the 2nd defendent so as to preclude him from ojecting to the minor respondent executing the decree, the objection being based on the ground that execution is barred by limitation and that his right to execute had not been satisfactorily proved. The reason for 2nd defendant's not being so estopped is that the notice issued under section 248 C. P. C in July 1909 was not personally served upon

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him and he was not otherwise aware of such notice. (See *Mochai Mandal* v. *Mesaruddin Mollah*[1])

(*e*) the said applications of 1905 and 1907 are however in accordance with law and hence the E. P. of April 1909 was not barred by limitation,

These were the conclusions of the Additional District Munsif of Tinnevelly and he rejected the decree-holder's petition to continue the proceedings in his Court on the ground that his Court has no jurisdiction to so continue the proceedings. The minor respondent then appealed to the District Judge against this order of the additional District Munsif of Tinnevelly refusing to continue the execution proceedings inaugurated in April 1909. The learned District Judge's conclusions may be stated thus:—

(*a*) S. 150 C. P. C. provides that when the business of any Court is transferred to any other court, the latter shall have the same powers and duties as the former had in respect of it. But (according to the learned District Judge) the execution petition of 1909 was a pending business in the Srivilliputtur Munsif's Court when it lost its jurisdiction over the territory (in which the attached properties were situated) on 1st June 1910 and such pending business was not legally transferred to the Additional District Munsif's of Tinnevelly. So the minor petitioner could not take advantage of S. 150 C. P. C. and contend that the Additional District Munsif was a court to which the business of the Srivilliputtur Munsif's court was transferred.

(*b*) But the Srivilliputtur Munsif's court, though it continued to exist and to be held in the same station and continued to have the jurisdiction over a portion of its former, territorial jurisdiction must be deemed to have "ceased to exist" within the meaning of section 37 clause (*b*) of the C. P. C. because the territories within the jurisdiction had been transferred to the newly created Ramnad District by the local Government and appeals from its decrees and orders lay thereafter to the Ramnad District Court and not to the District Court of Tinnevelly. Hence the Court which passed the decree had now become the Additional District Munsif's Court of Tinnevelly.

In other words the learned District Judge's view was that as the Srivilliputtur Munsif's Court ceased to exist the court which originally passed the decree ceased to exist and the Additional Dis-

1. (1910) 13 C. L J. 26.

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trict Munsif's Court of Tinnevelly became the court which passed the decree within the meaning of section 37 clause (*b*) and hence it ought to continue the execution proceedings.

(*c*) the 2nd defendent could not raise the question of limitation by reason of the alleged legal invalidity of the execution petitions of 1905 and 1907 as the order of the Srivilliputtur Munsif's Court of the 10th August 1909 allowing execution after declaring the service on 2nd defendant to have been duly effected cannot be questioned by the 2nd defendant now as he has not had that exparte order (allowing execution) set aside by proceedings in appeal or by any other legal means open to him. On the basis of the conclusions (*b*) and (*c*) above, the learned District Judge set aside the Additional District Munsif's order and remanded the petition for disposal of E. P. No. 389 of 1909 by that Court from the point it had reached on 23-2-1910 It is against this appellate District Judge's order of remand that the present C. M. Appeal 61 of 1913 has been filed before us. The arguments of the learned Vakil for the appellant before us might be shortly stated thus :—

(a) The learned District Judge was right in saying that S. 150 C. P. Code refers to the transfer of business owing to an order of transfer by a superior court as under S. 24 or any such similar order and that mere alteration of jurisdiction through the Local Government's notifications does not transfer any business within the meaning of S. 150 but the learned District Judge was in error in holding that the Srivilliputtur District Munsiff's Court ceased to exist within the meaning of S. 37 Clause (b) merely by reason of the fact that the territory over which the said Court had to exercise jurisdiction was included in a new district, the portion in dispute in these execution proceedings and which also formed the basis of the venue of the suit having been transferred to the Tinnevelly Munsif's Court's jurisdiction.

(b) The Srivilliputtur District Munsif's Court not having ceased to exist it also did not cease to have power to exercise jurisdiction within the meaning of Sec. 37 clause (b) because as the Court which passed the decree it continued to have jurisdiction under S. 38 C. P. C. (old S. 223) even though the property attached in execution of the decree had been transferred to the jurisdiction of the Additional District Munsif of Tinnevelly.

(c) As the Srivilliputtur District Munsif's Court continued to have jurisdiction to execute the decree the Additional District Munsiff's Court did not obtain jurisdiction either to execute the decree

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or to continue the execution begun in the Srivilliputtur Munsif's Court, only one of the two Courts being capable of executing the decree.

We shall consider briefly each of these three contentions. Before the new Code was passed there was a conflict between the decisions of the Calcutta High Court and the decisions of the Madras High Court in respect of the question whether a Court which passed the decree which directed the sale of immoveable property had jurisdiction to order the sale of that property if after the decree and before the application for sale, the said property had been transferred by the Local Government's notification's from its jurisdiction to the jurisdiction of another Court. The principal decisions of the Calcutta High Court on this question are *Lutchman-Pundah* v. *Maddan Mohan Shye*, [1] *Kartiknath Pandey* v. *Taluk Dhari Lall*,[2] *Prem Chand Dey* v. *Mokhoda Devi*[3], *Kali Pado Mukerjee* v. *Deno Nath Mukerjee*[4], *Jahár* v. *Kamini Debi* [5] and *Udit Narain Chaudhuri* v. *Mathura Prasad* [6]. We do not think it necessary to deal in detail with every one of these cases, *Kartiknath Pandey* v. *Taluk Dhari Lall*[2] was virtually overruled by the Full Bench decision in *Prem Chand Dey* v. *Mokhoda Devi*[3], The result of all these cases is that though under O. 21, R. 10 (old S. 230) the application for execution by sale of properties which had passed out of the territorial jurisdiction of the court which passed the decree might be made to the court which passed the decree it may also be made to the court which has acquired jurisdiction over the said properties as it is also included in the definition of the court which passed the decree by the strength of S. 37 Clause (b) as the court which passed the decree had ceased to have jurisdiction to sell the properties decreed to be sold. Hence according to the result of the decisions of the Calcutta High Court both the court which passed the decree and the court which had since obtained jurisdiction over the property could entertain an application for execution of the decree.

(b) Though both Courts could entertain the application the court which passed the decree had ceased to have jurisdiction to order the sale of properties and hence could not itself order a sale and if the execution application is made to it, it must transfer it to the court which had now obtained jurisdiction over the properties for passing and executing the order for sale :—

1. (1880) I. L. R. 6 C. 513
2. (1888) I. L. R 15. C. 667
3. (1890) I. L. R. 17 C. 699
4. (1897) I. L. R. 25 C. 315
5. (1900) I. L. R. 28 C, 238
6. (1908) I. L. R. 35 C. 974

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Thus the Calcutta High Court decisions make a distinction between the jurisdiction to entertain the execution application and the jurisdiction to order sale of properties in execution and while it gives jurisdiction to both the Courts which originally passed the decree and the court which had since obtained jurisdiction over the territory to entertain applications the said decisions give jurisdiction only to the latter court to order the sale . of the properties.

As regards the Madras High Court, the principal cases are *Gomatham Alamelu* v.*Komandur Krishnamacharlu*[1], *Panduranga Mudaliar* v. *Vythialinga Reddi*[2], *Subbiah Mudaliar* v. *Rakki*[3] and *Alagappa Mudaliar* v. *Thyagaraya Mudaliar* [4]. In *Gomatham Alamelu* v. *Komandur Krishnamacharlu* [1] it was merely held that if a court which had not got jurisdiction had passed a decree for sale of the properties outside its jurisdiction without objection by the defendant such a decree is not a nullity and the judgment-debtor could not object to the validity of such a decree in execution proceedings. In *Panduranga Mudaliar* v. *Vythialinga Reddi* [2] it was held that the Court which passed the decree for sale had jurisdiction to entertain an execution application for sale of that property even though the property had been transferred to the jurisdiction of some other Courts. Apart from the question of its jurisdiction to entertain the application whether it could itself order the sale of that property was not and need not have been considered in that case because the decree-holder in his application for execution, also prayed for the transfer of the decree to the Court which had since obtained jurisdiction over the properties directed to be sold. The decision in *Panduranga Mudaliar* v. *Vythialinga Reddi*[2] seems therefore to be not in conflict with the Calcutta decisions which only negative the right of the court which passed the decree to order the sale of the properties which had passed out of its jurisdiction, but do not negative the right of that court to entertain the application for execution. *Subbiah Mudaliar* v. *Rakki* [3] depended upon the meaning of Sec. 189 of the Madras Estates Land Act though there is a general observation that even when a statute takes away the jurisdiction of a class of courts to hear suits of a certain nature and transfers the jurisdiction to hear such suits to another class of courts, the 1st class of courts does not lose the jurisdiction over the suits pending at the time of the passing of the Act which so transfers the jurisdiction. In *Alagappa Mudaliar* v. *Thyagaraya Mudaliar* [4] doubt was thrown upon the decision in *Panduranga*

1. (1903) I. L. R. 27 M. 118
2. (1907) I. L. R. 30 M. 537
3. (1908) I. L. R. 32 M. 140
4. (1910) M. W. N. 477

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Mudaliar v. Vythialinga Reddi[1] and the learned Judges (*Wallis J.* and *Krishnaswami Aiyar* J.) say that the question whether the transfer of local area from the jurisdiction of one Court to another court would not divest the original court of jurisdiction over even pending suits was a question of " considerable difficulty." The learned Judges therefore without deciding that question disposed of the case on the assumption that the notification of the Local Government deprived the Subordinate Judge's Court of Tuticorin from trying the pending suit and they got over the difficulty by transferring the case to his file from that of the new court (Ramnad Court) to whose file it had been transferred (ex-hypothesi) by the notification. We are inclined to think that the Calcutta decisions in making a distinction between the jurisdiction to entertain applications and the jurisdiction to pass orders on such applications are not strictly logical : and that the court which passed the decree for sale of a property cannot even entertain an application in execution for sale of such properties. However the really important question is now settled in Calcutta namely that the new court which has since obtained territorial jurisdiction over the property ordered to be sold or sought to be attached and sold in execution has jurisdiction both to entertain an application in execution for such sale as also to pass orders on such applications. In Vol. II Encyclopaedia of Law and Procedure pages 713 and 714 the following passages occur : " A proper and lawful exercise of delegated legislative authority or the direct exercise of constitutional power, will operate to abolish a court or not, according to the intent expressed or lawfully to be implied within the principles heretofore stated. This intent governs in determining the effect of the adoption of a new constitution, *of the creation, alteration, and re-organization of new districts* circuits or other judicial sub-divisions of the detaching, attaching annexation and consolidation of districts and the transfer of jurisdiction in general. And it has been held that in the absence of a constitutional or statutory provision to the contrary causes pending in the abolished courts " (the same principle must apply by analogy where a portion of the jurisdiction is transferred) " are transferred by operation of law to the new courts no certificate or order transferring them being necessary. The new court will obtain and proceed to exercise jurisdiction over causes lawfully transferred. This rule includes authority to hold the remainder of a term which was in session when the statute took effect, the right to amend records relating to the judicial action of

1. (1907) I. L. R. 30 M. 537.

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the superseded courts &c. In Vol. 40 Encyclopaedia page 129 it is said " where pending an action a new county or district is created or existing lines are altered so that the subject matter of the action or the residence of defendant is thrown into a different county or district from what it was when the action was instituted there is some conflict of authority as to whether the venue should be changed accordingly or whether the action should proceed where it was instituted without a change of venue. The question depends largely upon the provisions of the statute." In American Digest Vol. 13 at page 1943, a decision is referred to in which it was held that a statute giving exclusive jurisdiction to justices in certain cases and containing no clause saving pending suits, deprived the circuit courts (which till then had jurisdiction over such cases) to try even pending suits. Another case is quoted in which a decree rendered by a probate court in a suit after the court was deprived of its jurisdiction by an Act (which came into force while the suit was pending, was reversed in appeal as passed without jurisdiction. *Remington* v. *Smith.*[1]

It seems to us on principle that unless the authority which changes the venue reserves the right to the court which has lost the jurisdiction to continue pending proceedings affecting the property so transferred to another jurisdiction such proceedings are also *ipso facto* transferred by the change of venue to the new court, the records relating to that action becoming part of the records of the new court. In the present case, it appears that since the change of venue was made from the Srivilliputtur Munsif to the additional District Munsif of Tinnevelly the Srivilliputtur District Munsif sent all the records remaining in his court in E. P. No. 389 of 1909 to the additional District Munsiff's Court of Tinnevelly thus washing his hands completely of that affair. We think he was right in doing so. As stated in *Prem Chand Dey* v. *Mokhoda Devi*[2] "so far as the Procedure Code is concerned execution of decree is only a continuation of the suit and there appears no legitimate reason why the court in the later stages of a suit should have greater powers than it possessed at its institution. But however that may be, a comparison of S. 223 with the last paragraph of S. 649 seems to us to indicate that territorial jurisdiction is a condition precedent to a court executing a decree." We might add that the new S. 150 introduced by the new Code seems to clearly imply that the whole business of a court might be transferred to another court without any order of transfer being passed by a superior court under Sec. 24 or any other

1. 1 Ohio. 53

2. (1890) I. L. R. 17 C. 699 (F.B.)

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Section of the Code, either as regards a particular case or as regard all the cases pending in a particular court. The introduction of this new section indicates in our opinion that the Calcutta view which held that by the changes of venue made by a Local Government the business of a court which loses jurisdiction over a certain area so far as it relates to cases affecting the lands in the transferred area will be *ipso facto* transferred to the new courts has been adopted by the Legislature—we are unable to agree with the learned District Judge that the word " transfer " of business under S. 150 covers only transfers made under special provisions of the Civil Procedure Code and we have found it difficult to follow the reasoning of the learned District Judge who relies on Secs. 8 (1), 13 (2) (3) and 17 (1) of the Bengal Civil Courts Act. Those provisions appear to us to have little bearing on the decision of this question. In the result we hold that the learned District Judge was right in his conclusion that the additional District Munsiff's Court of Tinnevelly has jurisdiction to continue the proceedings in execution initiated in the Srivilliputtur Munsiff's Court in 1909. Our reason for that conclusion is that the Srivilliputtur Munsiff's Court ceased to have jurisdiction to continue the proceedings in execution whereas the reason given by the learned District Judge is that the Srivilliputtur Munsiff's Court ceases to exist. Even if we are wrong in the above view we are prepared to get over the difficulty sought to be raised on the question of jurisdiction by transferring the execution petition 389 of 1909 from the Srivilliputtur Munsiff's Court for disposal to the file of the additional District Munsiff of Tinnevelly a similar expedient having been resorted to by the learned Judges who decided the case in *Alagappa Mudaliar* v. *Thiagaraja*[1].

The next point sought to be argued by the appellant was whether the execution application of 1909 was barred by limitation. The question of limitation depends upon certain facts alleged by the judgment-debtor the truth of which facts has not been gone into by the lower appellate Court as it was contended by the decree-holder that those facts cannot be gone into and the 2nd defendant being bound by the exparte order of August 1909 allowing execution of the decree in the respondent's favour. On the other hand the appellant's contention is that the order of August 1909 being an exparte order is not legally binding on him and has not the legal effect of estopping him from questioning its validity at later stages of the execution proceedings if he proves that he had no notice of the date fixed for the hearing of the execution petition of 1909. The res-

1. (1910) M. W. N. 477

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pondent's rejoinder to this is that till the appellant has that order of August 1909 set aside by proceedings under section 108 C. P. C. (New Order IX Rule 13) or by proceedings in appeal, it is binding on the appellant and estops him from denying the respondent's right to execute the decree. Now the order of August 1909 was no doubt an exparte order but it was passed after notice was issued to the 2nd defendant (appellant) to show cause why such an order should not be passed and after the court had satisfied itself on the affidavit and the return of the process-server that the notice had been duly served though by affixture to the outer door of 2nd defendant's house. An exparte order passed after issue of notice and after the court had held that the service of the notice was duly effected is, it seems to us on general principles binding as res judicata on the defendant just as much as a contested order or decree. It has now been settled (See *Hara Chandra Bairagi* v. *Bepin Behari Das*[1]) that an exparte decree does operate as *res judicata*. See also *Rajah Kumara Venkata Perumal Rajah Bahadur* v. *Thatha Ramaswami Chetti*[2] where *Benson* and *Sundara Aiyar* JJ. express the view that an exparte decree does estop the parties to the suit from disputing its validity in law. This effect of an exparte decree or order passed after notice (declared to be duly served on) the respondent does not rest merely upon the provisions of the Civil Procedure Code S. 11 but upon general principles of jurisprudence. Though as pointed out by the Privy Council in *Thakur Prasad* v. *Fakeer Ulla*[3] the special provisions of the Civil Procedure Code like the old Ss. 43 or 373 or 103 which preclude a litigant from bringing a fresh suit in respect of certain claims though they had not been actually heard and decided in the first suit could not apply to execution proceedings the general principles of jurisprudence which govern the courts as regards *res judicata* or estoppel by record do apply to execution proceedings and have been so applied following the well-known case of *Mungal Pershad* v. *Grija Lahari*[4] by all the Indian courts.

There is again no hardship in treating an order passed exparte in execution proceedings as binding on the judgment-debtor provided that notice had been issued to him and had been declared duly affected by the court. For, if he was really ignorant of the notice, he is entitled under S. 108 C. P. C. (O. IX R. 13 of the new code) to have the exparte order set aside by putting in his application within one month of his knowledge of the order under article 164 of the Limitation Act. It is contended by the appellant's learn-

1. (1910) 13 C. L. J. 38
2. (1911) I. L. R. 35 M. pp. 84, 85
3. (1894) I. L. R. 17 A. 106
4. (1881) I. L. R. 8 C. 51

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ed Vakil, Mr. L. A. Govindaraghava Aiyar that order IX rule 13 C. P. C. does not apply to exparte orders passed in execution but only to exparte decrees in suits. We think that that argument cannot be accepted. Orders in execution which come under S. 47 C. P. C. are decrees as defined in S. 2 of the Code and hence exparte orders passed in execution are exparte decrees and O. IX R. 13 provides generally for the setting aside of exparte decrees and not only for the setting aside of those classes of exparte decrees which are not also orders passed under S. 47 in execution proceedings. We are fortified in this view by the decision in *Krishna Chandra Pal* v. *Protap Chandra Pal*[1].

As regards the *obiter dictum* of *Mookerjee* J. in *Asim Mandal* v. *Raj Mohan Das*[2], that the whole of the rules in order IX do not apply to execution proceedings we need only say that the learned Judge was not directing the attention to every one of the 14 rules in Order IX when he pronounced that dictum but was generally considering the question whether the bar of fresh proceedings in suits enacted in rules 9, 12 and so on will apply to execution proceedings. There is no allusion in the learned Judge's decision to the case in *Krishna Chandra Pal* v. *Protap Chandra Pal* [1] which directly held that S. 108 (Order IX rule 13) applied to execution proceedings. The arguments of the appellant's learned vakil based on the fact that in article 164 of the Limitation Act the general expression " Summons " is used instead of " Summons or notice " does not convince us that article 164 was intended to apply to decrees strictly so-called and not to orders in execution which come under the definition of decrees in the Civil Procedure Code. Besides the remedy under S. 108, the defendant could also have sought the remedy by way of appeal against the exparte order. We are therefore reasonably clear that the exparte order of August 1909 allowing execution in favour of the respondent cannot be questioned in the further stages of the execution proceedings by the appellant. The learned District Judge was therefore right in refusing to go into the question whether the respondent was barred by limitation or any other cause from prosecuting the execution petition 389 of 1909.

It is next contended that the unstamped objection statement dated 27th July 1911 put in by the 2nd defendant might be treated as an application (under order IX rule 13) to set aside the exparte order passed in August 1909 in the respondent's favour and that an

1. (1906) 3 C. L. J. 276 2. (1912) 15 C. L. J. 582

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opportunity should be given to the appellant to prove as such applicant that he was not duly served with notice of the execution petition before that order of August 1902 was passed and that he had no knowledge of the passing of that order till within one month of his filing this statement in July 1911. No doubt in the case in *Mochai Mandal* v. *Mesuruddin Mollah*[1] an objection by the judgment-debtor that no notice had been really served upon him and that he had no knowledge of an order passed against him allowing execution of the decree was treated as of the same effect as an application to set aside the exparte order allowing execution and on its being not denied by the decree-holder that the judgment-debtor had not been duly served and did not have knowledge of the previous order allowing execution till 8 days before the judgment-debtor preferred his objections that order was treated as not binding upon him. But we think in the present case the objection statement of July 1911 cannot be treated as an objection to set aside the exparte order of August 1909 (a) as it is not stamped as an application (*b*) as there is no prayer in that statement to set aside the order of August 1909 and (*c*) as it does not appear from it when the 2nd defendant had notice of the order of 2nd December 1909 that is whether he had notice only within one month of the filing of the Memorandum of objections, and whether, if the objection statement be treated as an application to set aside the order of August 1909 such an application is not barred by limitation. If 2nd defendant had knowledge as seems probable from the other proceedings in the case of the order of August 1909 more than a month before the filing of the statement of objections in July 1911 he was barred from applying to set aside the exparte order of 1909.

In the result we dismiss the appeal with costs.

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1. (1910) 13 C. L. J. 26.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller, and Mr. Justice Tyabji.

Kachi Yuva Rangappa Kalakka Thola Udayar } *Appellant* In Ap. 223. (1st Defendant.)*

v.

Kulandai Ayal *Respondent In Do. (Plaintiff.)*

Kulandai Ayal } *Appellant* in Ap. 239 of 1911. (Plaintiff.)*

v.

Kachi Yuva Rangappa Kalakka Thola Udayar } *Respondent in Do. (Defendant.)*

Rangappa Kalakka *v.* Kulandai Ayal

Hindu Law—Impartible estate—Widow of junior member—Right to maintenance—Members's right to fix descendants' maintenance—Lower rate allowed as past maintenance—Delay in suing—Limitation Act, art. 129—Demand and refusal—Burden of proof.

Widows of junior members of a family owning an impartible estate are entitled to receive maintenance out of it; *Tirumla Rao Saheb* v. *Ranga Rao Saheb*[1] approved.

Quaere, if a member can bind his descendant to receive a particular amount as maintenance out of the Zamindari.

Under Art. 129, Limitation Act the onus of proving that there was a denial in respect of the plaintiff's right of maintenance more than twelve years before suit is on the defendant.

In the circumstances of the case, having regard to the fact that there was great delay in making the claim and it was not shown that the plaintiff had to borrow money or had difficulty in maintaining herself, she was allowed for past maintenance a lower rate than was allowed for years after suit.

Appeals from the decree of Court of the Subordinate Judge of Thichinopoly in Original Suit No. 9 of 1910.

S. Srinivasa Aiyangar for Appellant.

K. Srinivasa Iyengar, A. Krishnaswami Iyer and *R. Rangaswami Iyengar* for Respondents

The Court delivered the following

Judgment:—It is claimed for 1st defendant that the suit is barred by limitation on the ground that the plaintiff's right to receive maintenance from the Zemindar was denied more than twelve years before the date of the plaint. It is on the 1st defendant to prove this denial and in our opinion he has failed. We agree with the Subordinate Judge that the four witnesses examined on the 1st

*A. Nos. 223 and 239 of 1911. 20th January 1914.

1. (1912) 23 M. L. J. 79

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defendant's side are untrustworthy and the story which they tell seems to us to be improbable. Eliminating that evidence there remains only the fact that no maintenance has been paid to plaintiff at any time since her husband's death and the plaintiff's allegation in Exhibit U that when the *Zemindar* was asked to provide for her he promised to arrange—a statement in paragraph 12 of the plaint is relied on as an admission of the alleged denial but it does not amount in our opinion to an admission of the denial of a right to receive maintenance. The evidence is insufficient to prove that the right was denied.

The alleged denial not being proved there is no room for the application of article 129 of the First Schedule of the Limitation Act and accepting the view presented on behalf of the 1st defendant, that that article is the specific article applicable to a suit for future maintenance there is no bar because there has been no denial.

The first defendant contends that the plaintiff as widow of a junior member of his family is not entitled to maintenance out of the *Zemindari*. It having been decided in this Court that junior members of the family of a holder of an impartible estate are entitled to maintenance out of the impartible property, there is no reason why their widows should not also be entitled to maintenance. The decision of this Court in *Tirumal Rao Sahib* v *Rangadani Rao Sahib*[1] shows that the juniors are to be considered as members of a joint family of which the senior is also a member. Accepting that as the principle on which the decision is to be based we can hardly refuse to treat the case of the widow as though she were the widow of a member of a joint family and on that footing to admit her right to maintenance.

A further contention is that the plaintiff cannot claim maintenance from the *Zemindar* because her husband in compromising a suit in which he claimed the *Zemindari*, accepted by his guardian an allowance of Rs. 750 a month for himself and his two brothers, and agreed to give up any claim to succeed to the *Zemindari*.

We think it unnecessary to say more on this point than that this allowance charged on certain villages of the *Zemindari* is clearly on the construction of Exhibit III, nothing more than a maintenance allowance for the three brothers and that the compromise did not operate to give the plaintiff's husband a separate ownership of any part of the *Zemindari* descendible to his heirs except by a division of the estate, and that was clearly not intended even if it

1. (1912) 23 M. L. J. 79

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could be effected. It is at least doubtful whether the plaintiff's husband could bind his heirs to receive a particular amount as maintenance out of the *Zemindari* in lieu of such rights as they might have independently of his right to receive maintenance for his life. The compromise does not therefore stand in the way of the plaintiff's claim.

There remains for consideration the question of the amount to which the plaintiff is entitled. The 1st defendant does not quarrel with the Subordinate Judge's decree so far as it relates to maintenance falling due after the suit, but the plaintiff in a cross appeal challenges it as making insufficient provision for her wants.

As regards arrears the 1st defendant attacks the decree on the ground that arrears ought not to be awarded at the same rate as future maintenance it not having been shown that plaintiff was, as she alleged, obliged to borrow money to maintain herself.

As regards the amount of maintenance though we are disinclined to interfere with the discretion of the Subordinate Judge, we think that the allowance he has made should in a way be adjusted by a decrease in the rate at which arrears are to be paid and an increase in the rate of future maintenance. In 1845 a lady in this family received only Rs. 40 a month but having regard to the increased cost of living to which the Subordinate Judge refers, to be more than proportional increase in the income of the *Zemindar*, to the fact that the plaintiff's husband was allowed Rs. 250 a month we do not think that an allowance of Rs. 80 a month exceeds what is required to maintain the plaintiff in circumstances suitable to her position and for the maintenance after the suit we shall modify the decree accordingly. But in regard to the arrears it has to be remembered that the plaintiff is a widow and not entitled to any share or interest in the property of her husband's family: the widow's maintenance is properly such allowance as may keep her in a suitable condition of comfort whereas the maintenance of a male member of a joint family represents at least to some extent his interest in the property of the family. We think therefore that it is not improper to take into consideration the fact that the plaintiff has not shown that during the twelve years in which she received nothing from the *Zemindar* she had to borrow money or had any difficulty in obtaining all the comforts which she required. She allowed one year's allowance to be barred by limitation a fact which suggests that her need of money was at least extreme. We have to consider also the fact that she is now to receive in a lump sum the allowance which she has for so long delayed to demand and on the whole we

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think that a sum of Rs. 6000 i. e., slightly more than Rs. 40 a month is as much as she ought now to be given. We modify the decree accordingly and confirm it in other respects. As regards costs in the Lower Court the plaintiff will receive proportionate costs on the amount we have allowed her and 1st defendant will bear his own costs. In this Court the 1st defendant will pay plaintiff's costs of appeal No. 223 of 1911 and in appeal 289 of 1911 the parties will bear their own costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar.

Palani Chetty, and others — *Petitioners (Petrs.).*

v.

Rathina Chetty, and others — *Respondents. (Respts.).*

Charter Act S. 15—Cr. Pr. Code S 145—Interference not limited to questions of jurisdiction—Gross miscarriage of justice—Possession of person to whom possession given by Magistrate with consent.

Palani Chetty v. Rathina Chetty

The power of the High Court under Charter Act S. 15 to interfere with orders passed under S. 145 Cr. P. C. is not confined to cases where a question of jurisdiction is involved but it will exercise it only when there has been a gross miscarriage of Justice.

Possession of a person to whom the Sub-Magistrate (passing orders under S. 144) gave possession of a mutt by consent of both sides, cannot be considered to be on behalf of the person having title.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and, under S. 15 of the Charter Act praying the High Court to revise the order of the Sub-Divisional Magistrate of Cuddalore dated the 25th September 1913 in Mis. Case No. 45 of 1913.

T. Rangachariar for petitioners.

The Public Prosecutor on behalf of the Government.

H. Balakrishna Rao for *K. Narain Rao* for Respondents.

The Court made the following

Order :—This is a dispute about the possession of a Bhajana Mattam. The Sub-Divisional Magistrate has passed an order under S. 145, Cr. P. C., to the effect that the 1st defendant is in possession and shall remain in possession till evicted in due course of law.

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*Cr.R.C. No, 667 of 1913 & Cr.R.P. No. 548 of 1913. 30th January 1914.

Palani Chetty v. Rathina Chetty

The petitioners have filed this Revision Petition under Ss. 435 and 439, Cr. P. C., and S. 15 of the Charter Act.

As regards Ss. 435 and 439 Cr. P. C., they are clearly not applicable (See cl. (3) of S. 435)

Coming to S. 15 of the Charter Act, there are no doubt observations in the case, *Kamal Kutty* v. *Udayavarma Raja Valia Raja*[1] to the effect that "it has never been customary to interfere" under S. 15 of the Charter Act "except where it can be said that the Magistrate's order was passed without jurisdiction." If I may say so with respect, that custom or practice is a very wholesome custom which should not be lightly departed from, especially in cases of orders under Sec. 145, Cr. P. C., with respect to which the Indian Legislature has indicated its view that it is inadvisable to interfere in revision under Ss. 435 and 439, Cr. P. C., I do not think that the case in *Kamal Kutty* v. *Udayavarma Raja Valia Raja*[1] decides that this Court has no power or jurisdiction to interfere under S. 15 of the Charter Act unless the Magistrate had no jurisdiction to pass the order sought to be revised. The learned Judges, no doubt, refer to *Bhaskari Kasavarajudu* v. *Bhaskaram Ghalapatirajudu*[2] where there is an observation that "The Magistrate had jurisdiction to act under S. 145 Cr. P. C. and this Court *has no jurisdiction to interfere.*" But the report in *Bhaskari Kasavarajudu* v. *Bhaskaram Ghalapatirajudu*[2] shows (see footnote at page 318) that the petition in revision in that case was filed only under Ss. 435 and 439 Cr. P. C., (and not under the Charter Act also) and the High Court had therefore no jurisdiction to interfere under those Sections of the Criminal Procedure Code.

In the present case, following the usual custom from which I see no sufficient reason to depart, I decline to interfere under S. 15 of the Charter Act as no question of the Magistrate's Jurisdiction is involved and as I am not satisfied that there has been any gross miscarriage of Justice. The Sub-Magistrate gave possession of the Mattam by consent of both sides to a Poosari in March 1913. That Poosari (it is said) was a sort of receiver appointed by the Magistrate. I am unable to hold so. The Sub-Magistrate had no power to appoint a receiver in proceedings under S. 144 C. P. C., The Sub-Inspector of Police who gave possession to the *Poosari* did not treat the *Poosari* as the Receiver of the Sub-Magistrate's Court, for, he says that "respectable citizens of the Vennia Caste agreed to

1. (1912) M. W. N. 1154 at p. 1159. s. c. 23 M. L. J. 490
2. (1908) I. L. R. 31 M. 318

Palani Chetty v. Rathina Chetty

hand over the properties *to the Court of Police* when called upon." Surely, the Receiver of a Court is not bound to hand over the properties to the Police. Again the Sub-Magistrate construed the Poosari as in possession with a liability on "some of the leaders of the community to produce the properties when required *by any Court.*" Hence the cases of *Joyanti Kumar Mookerjee* v. *Middleton*[1] *Ismail Ghani* v. *Khatinna Rowther*[2] and *The Hindus of Kannampalaiyam Village* v. *Kaikkolar Christians* [3] quoted by the petitioner's learned vakil to the effect that a Receiver's possession is the possession of the party entitled and that an order under S. 145 could and should be passed in favour of the person in possession within 2 months before the receiver was appointed though that possession had ceased (by the Receiver's having taken over possession) more than 2 months before the date of the order under Cl. (1) of Sec. 145, seem not to be applicable—I might be permitted also to reserve with the greatest respect, my views as to the correctness of those decisions when the matter has to be considered by me in any case in which that question directly arises.

In the result, I dismiss the petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Kopalli Krishna Row Garu — *Appellant in S. A. No. 2073 of 1912 (Plaintiff.)**

v

The Collector of Kistna on behalf of the Secretary of State for India in Council. — *Respondent (Defendant.)*

Madras Irrigation Cess Act (VII of 1865) S. 1—Rules under—Penal rate—"Water taken from a source other than approved"—Meaning of—Presumption of taking—Insertion of second pipe—Liability though insertion not proved to be by plaintiff.

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Where plaintiffs' lands were irrigated from two pipes instead of one which was authorised but there was nothing to show that the plaintiffs were responsible for the insertion of the additional pipe.

Held: *per Ayling J.* that water "was taken from a source of supply other than approved" within the meaning of the rules and plaintiffs were liable for a double or penal water rate.

Per Tyabji J. that in the absence of an explanation from the plaintiffs the water must be presumed to have been taken by them.

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*S.A. Nos. 2073 to 2076 of 1912 — 21st January 1914

1. (1900) I. L. R. 27 C. 785
2. (1911) 22 M. L. J. 154
3. (1911) M. W. N. 44

Kiishna Row *v.* The Collector of Krishna

Per Ayling J. Considerations of public policy cannot justify Courts in putting a strained construction on the rules but where the wording is consistent with what such considerations would dictate, they are not without weight.

Appeals from the decrees of the District Court of Kistna in A. S. Nos. 76, 58, 83 and 82 of 1911 preferred against the decrees ot the Court of the Additional District Munsif of Masulipatam in O. S. Nos. 1499, 1406, 1599 and 1586 of 1908 respectively.

C. V. Ananthakrishna Aiyar for Appellant.

The Government Pleader for Respondent.

The Court delivered the following

Judgments:—*Ayling J.*—The suit out of which these second appeals arise were brought to recover penal water rate alleged to have been illegally collected from the plaintiffs for fasli 1317 in respect of certain *Zemindari* wet lands belonging to them. The District Munsif gave the plaintiffs a decree in three of the suits and dismissed the fourth. The District Judge on appeal dismissed the suits holding that the plaintiffs were liable to pay the penal water rate collected from them.

The lands admittedly were irrigated by means of Government water, and their liability to pay water rate under section 1 of Act VII of 1865 is not disputed. The levy of penal water rate is regulated by rules framed under the said section and published at page 2 of the appendices to the standing orders of the Board of Revenue Rule 5 runs.

" Double water rate will also be charged if water is taken from a sluice or channel or other source of supply other than that which is provided or approved by the responsible officers of the Public Works Department."

In the present case it is found that the authorised source of irrigation is a single pipe (or a row of pipes) leading from the " Manager Kodu " channel and that the irrigation of the suit lands was actually effected by means of the water of the said channel passing through two pipes (or rows of pipes) the second having been inserted without the authority or approval of the Public Works Department. The effect of the insertion of the second pipe would be to double the supply of water available. It may be noted here that according to the plaints, the suit lands were irrigated and apparently entitled to be irrigated, not from the "Manager Kodu " channel, but from another source—altogether—

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Ayling J.

the Nibhanapudi channel. These allegations have been found to be false. It has however to be determined whether on the facts found the levy of the penal rate was legal.

The arguments of the learned vakil for the appellant have been practically devoted to showing that rule 5 quoted above will not apply to these cases because it is not shown that the water used was 'taken' by the appellants from an unauthorised source. It is not denied that the second pipe was unauthorised or that water passing through it irrigated the suit lands. But it is urged that the pipe is situated a mile distant from the suit-lands: that there is nothing to show that the plaintiff's inserted it or abetted its insertion : and that the mere fact that the water passing through it flowed on to the plaintiff's lands will not bring the case within the meaning of the rule.

After careful consideration I do not think this contention can be accepted. The Act itself admittedly draws no distinction between the use of Government water with or without the active co-operation of the owner of the land irrigated. (*Vide Secretary of State for India* v. *Swami Naratheeswarar*[1].) But it is suggested that the rules do : and that the adoption in the Rules of the word 'taken' in preference to 'used' indicates that the penal rate is only to be charged when the person using the water had taken some active step to obtain the water. I can find no basis for such a distinction and in the connection in which it it used, I do not think any such special meaning as is suggested should be attached to the word "taken". Where, as in the present case, the water proceeds through an open pipe, no active "taking" is necessary or indeed, practicable, after the pipe has been put in position for the water flows of itself. If the rule had been intended to bear the interpretation placed on it by the appellant's vakil case would have been taken to make it clear that the penal rate was only leviable from a person who took the water, instead of using the phrase "is taken" in the passive voice and impersonally.

It is argued that any wider interpretation of the rule would expose an innocent cultivator to an enhanced charge in consequence of an unauthorised augmentation of his water supply, which may have been effected without his knowledge or even against his wish ; and that it is unlikely that such could have been the intention of the framers of the rules. The answer to this is twofold. In the first place it does not follow that, because penal rate is legally leviable, Government will demand it from persons who have quite

1. (1910) I. L. R. 34 M. 21

innocently become liable to it. In the second place if the probable intentions of the framers of the rules are to be looked to all the considerations presented to them must be borne in mind. As a matter of fact it is very seldom possible to prove who effects an unauthorised diversions of water for irrigation purposes. Such diversions are usually effected secretly and involve little time or labour, and, as in most cases they benefit not only the culprit himself but all those who hold land in the immediate vicinity including in many cases, the local village officials themselves, the chances of detection are small indeed. The main safeguard against such acts is the liability of everyone profiting thereby to be charged penal water rate. If this liability is to be limited to persons who can be shown to have actively co-operated in diverting the water, the rule will be simply nullified. Now the prevention of unauthorised interference with government irrigation sources is a matter of vital importance, not only to the public revenue but (what is even more serious) to the public peace.

Throughout this Presidency irrigation disputes are even now frequently the cause of riots and bloody affrays. As already stated where one or more ryots secretly divert water for the benefit of their own lands, their immediate neighbours usually share in the benefit but in almost every case, other ryots holding lands lower down will be prejudiced or will deem themselves prejudiced and the temptation to take the law into their own hands will frequently prove irresistable, and will produce lamentable consequence.

The desirability of preventing so far as possible unauthorised interference with Government irrigation sources is therefore a matter of vital importance and can hardly have been overlooked by the framers of the rules.

I do not suggest that these considerations of public policy are any reason for putting a strained interpretation on the rule but where the wording is consistent with what such considerations would dictate, and where it is argued that a word in the rule was deliberately selected as bearing a narrow meaning inconsistent therewith, I think they are not without weight.

In my opinion the penal water rate was legally leviable and I would dismiss the appeals with costs.

Tyabji J :—The question involved in this appeal is whether the plaintiff was liable to be charged a double water-rate for fasli 1317 under the following rule :—

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Tyabji J.

"Double water rate will also be charged if water be taken from a sluice or channel or other source of supply other than that which is provided or approved by the responsible officer of the Public Works Department." Vol. II of Standing Orders of the Board of Revenue page 4. The plaintiff alleged that his lands were entitled to take water from the Nibhanupadi channel, and that as a matter of fact the lands were irrigated by water from that channel in Fasli 1317. On both these points the findings are against the plaintiff. It is found that the plaintiff's land is entitled to receive water from another channel the Manager Kodu, and that the water did come from that sluice, only one sluice being authorised. The plaintiff on these findings was held liable to the double water-rate. The plaintiff's case in the court of first instance was not that he had taken water from the Manager Kodu from which he is really entitled to take it and which is the source "provided or approved by the responsible officer of the Public Works Department." If this had been the plaintiff's case and if he had further pleaded that no act had been done by him or to his knowledge, or for which he was responsible by reason of which the source ceased to be so provided or approved, and that he was not in fact aware of the source having ceased to be provided or approved,—in that case some questions might have arisen on which I do not at present feel called upon to express any opinion. But on the allegations of the plaintiff and on the findings to which I have alluded, it seems to me to be clear that after two sluices had been made instead of one, the Manager Kodu as a matter of fact ceased to be a source approved by the Public Works Department. It is also clear, that the plaintiff's land was irrigated by water coming through this unauthorised channel; it seems to me that where it is proved that a certain piece of land is irrigated by water coming from a certain source, in the absence of some explanation being offered it may well be considered that the water has been taken (within the terms of the rule) by the person whose land is so irrigated. The rules ought, it is true, not to be strained in a penal sense, but neither ought they to be construed as though their object were to provide a variety of methods by which the sources of irrigation might be tampered with, without any one being responsible for such tampering by becoming liable for enhanced water rate. The object of the rules is just the reverse and within reasonable limits, it seems to me, that object ought to be given effect to. I quite agree, however, with my learned brother that it is assuming too much to proceed on the basis that the double water-rate would necessarily be levied by the Govern-

Krishna Row v. The Collector of Krishna — Tyabji J.

ment in every case where the legal liability to pay it arises, though the person becoming liable may have acted in good faith. throughout and may not have unduly benefitted by water coming from an unapproved source.

For these reasons, I agree that the appeal should be dismissed with costs.

The judgments in second appeal Nos. 2074 to 2076 will follow.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar, and Mr. Justice Spencer.

Banuddin Sahib — *Appellant—Petitioner (1st Judgment debtor)*

v.

Arunachala Mudali — *Respondent—Respondent (decree-holder.)*

C. P. C. Order 2 r. 157—Attachment before Judgment not affected by when no application for sale in pursuance of the same—Application for rateable distribution, effect of

Banuddin Sahib v. Arunachala Mudali

Order 21, Rule 57 makes an attachment cease on the dismissal of an execution application only if the attachment had been made in execution of the decree and not when the attachment is one made before judgment and there has been no application for sale in pursuance of the same.

An application for rateable distribution of the proceeds of the sale of the properties attached in execution of another decree has not the effect of converting the attachment before judgment into an attachment in execution.

Appeal from the order of the District Court of North Arcot in appeal suit No. 294 of 1911, preferred against the order of the Court of the District Munsif of Tiruppatur in Civil Miscellaneous Petition No. 237 of 1911 (in Original Execution Petition No. 174 of 1911 in Original Suit No. 431 of 1901).

A. Visvanatha Aiyar for *C. S. Venkatachariar* for Appellant.

P. R. Ganapathi Aiyar for Respondent.

The Court delivered the following

Judgment :—We agree with the Lower Courts that the attachment before Judgment did not cease to exist because the decree-holder (among his numerous Execution Petitions) applied once for arrest of the judgment-debtor and that application was dismissed for default.

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*A. A. O. No. 43 of 1912. 16th December 1913.

We think that order 21 rule 57 of the Civil Procedure Code makes an attachment cease on the dismissal of an execution application only if that attachment had been made "in execution of" the decree and not when it had been made before judgment in view to a possible execution of a decree which might probably be passed thereafter.

The other contention of the appellant namely that by the petitioner's having applied in another execution petition to be allowed to share rateably in the proceeds of the sale of these properties if they were brought to sale by another decree-holder who had also attached them in execution of his decree, the present decree-holder converted the attachment before judgment into an attachment in execution is also not sustainable. Such conversion can take place only if the decree-holder applies for sale of the properties in execution of his own decree. Whether such conversion will take place even in such a case may be questioned on the authority of *Gones Chandra* v. *Banmari Lal* [1] but it is unnecessary to decide that question for the purposes of this case. The third contention that by the decree-holder's conduct he must be deemed to have abandoned all rights under the attachment before judgment is, again not supported by anything on the record.

The view of the Lower Courts, therefore that no fresh attachment is necessary to entitle the decree-holder to bring the properties to sale in execution is correct, and we dismiss the appeal with costs.

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1. (1912) 16 C. L. J. 86

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling.

Rallabamdi Subbiah and others *Petitioners.*[*]

v.

1. Sri Rajah Venkataramiah Appa Rao Bahadur Zemindar Garu.
2. Sir Rajah Sobbanadri Appa Rao Bahadur Zemindar Garu minors by next friend and manager M. Narasimham Pantulu Garu, on behalf of the Court of Wards, Nuzvid.

Respondents in all cases,

(Plaintiffs in all cases).

Landlord and Tenant—Raising wet crops paying particular cist—Claim for a higher rent—Unsustainable without notice in time of intention to demand higher rent.

Where it appeared that for a number of years the tenant was cultivating the land with wet crops paying a kist of 15 as 10 pies per acre. Subbiah *v.* Venkataramiah Appa Rao

Held that the landlord was estopped from claiming more for any fusli when he had not given the tenant timely notice that he was going to make a higher claim as in that case the tenant might have elected to raise only dry crops.

Petitions under S. 25 of Act IX of 1887 praying the High Court to revise the Decrees of the District Munsif of Gudivada in Small Cause Suits Nos. 429, 430, 435, 436, 440, 442 and 444 of 1910, dated 19th June 1912.

T. R. Venkatrama Sastri for Petitioners.

Dr. Swaminathan for Respondents.

The Court delivered the following

Judgment:—The District Munsif does not appear to have considered the legal effect of his finding on the third issue, that defendants had no notice of plaintiffs' intention to demand a higher rent for the suit faslis. It is in evidence that the suit lands had been cultivated with wet crops for at least 15 years (according to defendants, 24 or 25 years), and that during the whole of that time cist was collected only at the rate of 15 annas 10 pies per acre. In the absence of intimation to the contrary the tenants were justified in inferring that they would be allowed to cultivate on the same terms for the suit faslis, which expired on 30th June 1909. Plaintiffs gave them no notice of their intention to make higher claim, but in 1910 filed suit for rent at a higher rate. If the tenants had received notice, they might have elected to raise dry crops only and thus

[*]C. R. P. Nos. 1019 to 1025 of 1912, 6th January 1914.

Subbiah v. Venkataramiah Appa Row

escape the higher demand. It appears to me that in these circumstances plaintiffs are estopped from demanding the higher rent they claim for the suit faslis (Vide *Narasimhachari* v. *Gopala Aiyangar*[1] and *Sri Sankarachari Swamiar* v. *Varada Pillai*[2].)

The Munsif's decree also appears to be erroneous as regards the allowance of Karnam's selagam. The defendants disputed their liability to pay this. The only evidence adduced in support of the demand consists of entries in Exhibit A, series, Muchilikas dated 1875. No evidence is adduced to show that this selagam was ever collected, and there is positive evidence that it was not paid for a period of 15 or 25 years.

The Munsif's decree must be set aside and plaintiffs given a decree for rent for Faslis 1317 and 1318 at the rate of 15 annas 10 pies per acre only with interest thereon at 6 per cent. per annum. Each side will get proportionate costs both here and in the Small Cause Court.

This Judgment will govern Civil Revision Petitions Nos. 1020 to 1025 also.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

S. Tiruvenkatachariar ... *Appellant**. (*Plaintiff*.)

v.

Venkatachariar and others... *Respondents*. (*Defendants*.)

Specific Performance—Contract to sell land—Bonafide purchaser for value without notice—Burden of proof on purchaser—Hindu law—Death of contracting party—Sons brought in as representatives—Right to impeach contract.

Tiruvenkatachariar v. Venkatachariar

In a suit for specific performance of a contract for the sale of immoveable property, it is not for the plaintiff to show that a subsequent purchaser had notice of the contract but it lies on the latter to make out that he is a bona-fide purchaser for value without notice.

If, before decree, the persons that entered into the contract (being Hindus) die leaving sons behind who are brought on record as legal representatives it is open to the latter to show that the contract is not binding on them as sons.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 202 of 1909 preferred against the decree of the Court of the District Munsif of Chingleput in O. S. No. 218 of 1908.

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*S. A. No. 826 of 1911. 25th July 1913.

1. (1905) I. L. R. 28 M. 391.

2. (1903) I. L. R. 27 M. 392.

Tiruvenkatachariar v. Venkatachariar

T. R. Ramachandra Aiyar for Appellant.

T. M. Krishnaswami Aiyar for Respondents.

The Court delivered the following

Judgment:—The learned District Judge in considering the evidence in the case has proceeded upon the ground that the burden of proving that the 3rd defendant's purchase from the 2nd defendant was made with notice of the prior contract to sell alleged to have been made with the plaintiff by defendants Nos. 1 and 2, lay on the plaintiff. The case of *Himmat Lal Moti Lal* v. *Vasudev Ganesh*[1] decides that the burden of proving (*a*) that the subsequent purchaser paid valuable consideration (*b*) that he acted bona fide and (*c*) that he had no notice lies on that purchaser, assuming, of course, that the plaintiff has established the prior agreement to sell, alleged in his plaint. Further the District Judge has not at all considered several circumstances mentioned by the Munsif as pointing to *mala fides* on the defendant's part; see paras 31 to 33 of the Munsif's judgment.

Lastly, the District Judge is clearly wrong in saying that, even after his findings in favour of the 3rd defendant, he need not go into the questions involved in issues 8 and 9 and that the plaintiff should be relegated to another suit to obtain the reliefs he would be entitled to as against the 2nd defendant when the plaintiff failed as against the 3rd defendant. It is also unsatisfactory that the District Judge has not given a finding on the question whether there was really a contract to sell made between the plaintiff and defendants Nos. 1 and 2, and whether a sale-deed was executed by defendants Nos. 1 and 2 in 1905 (see paragraph 2 of the District Judge's judgment where he says " assuming the sale alleged by the plaintiff in his favour to have been really executed.")

We reverse the judgment of the District Judge as unsatisfactory on all points and remand the case to the District Court to decide the appeal *de novo*. The District Court is requested to give definite findings on all the issues in the case when deciding the appeal and also on the question as to the approximate value of the plaint property at the time of the plaintiff's sale deed and the 3rd defendant's sale-deeds, the payments alleged by the 3rd defendant to have been made towards the purchase money of Rs. 1250, whether Rs. 1250 was a real or a fictitious price and so on. Costs of this second appeal will be costs in the cause. Defendants Nos. 1 and 2 having both died if the 2nd defendant's son raises any question as to his liability to fulfil the obligations of the father the District Court will go into and decide such questions also.

1. (1912) I. L. R. 36 B. 446.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar.

The Sessions Judge of Cuddapah ... *Petitioner.**

v.

Kondeti Obalesu and another ... *Respondents.* (*2nd and 3rd accused.*)

Criminal Procedure Code, S. 195—Forged document—Prosecution in respect of, by person not party to a proceeding in which document was produced—Sanction not necessary.

Sessions Judge of Cuddapah *v.* Kondeti Obalesu

No sanction is required for the prosecution of a person in respect of a forged document when he is not a party to the proceeding in which the forged document is produced.

John Martin Sequira v. Luja Bai[1] followed.

Petition praying for the reasons stated in the order of the Sessions Court dated 12th January 1914, the High Court will be pleased to quash the commitment of the 2nd and 3rd accused in S. C. No. 2 of 1914 on the file of the Sessions Court of Cuddapah (P. R. No. 3 of 1912 on the file of the Sub-Magistrate, Jadiki).

S. Ranganatha Aiyar, Vakil for Respondents.

Public Prosecutor (C. F. Napier) for the Government.

The Court made the following

Order:—The learned Sessions Judge ought to have followed the law clearly laid down by this Court in *John Martin Sequeira* v. *Luja Bai*[1] that where a person "was not a party to the proceedings in the Court in the case in which the alleged forged document was produced, no sanction for his prosecution was required." Assuming that Bombay High Court took a different view in 6 Indian Cases 529 (a report which is not available to me) the Sessions Judge was bound by the decision of this Court in *John Martin Sequeira* v. *Luja Bai*[1]. As regards the difference in language between S. 469 of the old Criminal Procedure Code of 1872 and S. 195 of the present Code, I see no essential difference in meaning and intent. The old section is worded thus "A complaint of an offence relating to documents described in Ss. 463, 471, 475 or 476 of the Indian Penal Code, when the document has been given in evidence in any proceedings in any Civil or Criminal Court, shall not be entertained *against a party to such proceedings* except with the sanction etc." The new section 195 (c) is "No Court shall take cognisance of any offence described in Section 463 or punishable under Ss. 471, 475, or 476 of the same Code, when such offence

*Cr. M. P. No. 36 of 1914. 6th February 1914.

1. (1901) I. L. R. 25 M. 671.

has been committed *by a party to any proceeding* in any court in respect of a document produced or given in evidence in such proceeding except with the previous sanction etc.' Sessions Judge of Cuddapah v. Kondeti Obalesu

I think that both sections contemplate the necessity of sanction only in case the offence which the Criminal Court is asked to entertain has been committed *by a party to the proceeding in the other Court.*

This is also the view taken in *Debi Lal* v. *Dhajadarin Gashai*[1] which refers with approval to *John Martin Sequiera* v. *Luja Bai*[2]. I therefore do not accept the reference and direct the Sessions Judge to proceed with the trial of the prisoners committed to his Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Gottipati China Kondian — *Appellant** *(Plaintiff).*

v.

Gottipati Narasappa Naidu and others — *Respondents.* *(Defendants).*

Partnership—Dissolution—Suit for share of collections made by one partner—Maintainability of—Limitation for—Defence that plaintiff is not entitled, having regard to state of general account—Admissibility of—Practice—Remand for trial on this aspect of case.

China Kondian v. Narasappa Naidu

Action is maintainable by a partner for his share of the collections made by another partner although more than three years have elapsed from the date of the dissolution of the partnership provided the action is brought within three years of the collection.

In such an action, it is open to the defendant to show not only that the alleged collections were not made but also that having regard to the state and result of the general account, plaintiff is not entitled to recover.

In the circumstances of the case, their Lordships in second appeal, sent the case down for retrial on the footing that the suit was one for plaintiff's share of the collections though this aspect of the case was not pointedly insisted upon in the Lower Courts which dealt with it as one for settlement of accounts of the dissolved partnership.

Second appeal from the decree of the District Court of Nellore in Appeal No. 89 of 1909, preferred against the decree of the Court of the District Munsif of Kanigiri in O. S. No. 458 of 1907.

T. Subramania Aiyar for Appellant.

Hon'ble T. V. Seshagiri Aiyar and *T. V. Muthukrishna Aiyar* for Respondents.

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* S. A. No. 1589 of 1910. — 21st January 1914.

1. (1911) 15 C. W. N. 565 — 2. (1901) I. L. R. 25 M. 671

Chinna Kondian v. Narasappa Naidu

The Court delivered the following

Judgment:—*Sadasiva Aiyar J*:—The plaintiff is the appellant before us. His suit, as I understand it (especially from the 10th paragraph of the plaint), is based on the allegations that the partnership between himself and the defendants was dissolved by consent in October 1903 and that between October 1903 and May 1904, the plaintiff's and 3rd defendant's men collected the debts due to the partnership and paid the moneys so collected to defendants Nos. 1 and 2. The reliefs prayed for in the plaint are that "all the accounts relating to the partnership trade may be sent for to the Court and the accounts settled and that a decree may be passed directing recovery from defendants 1 and 2 and from their family property of the amount of Rs. 846-4-0 which the plaintiff believes, should be due to him for his share of the amount collected and paid to defendants 1 and 2 or of any larger amount which will be found upon settlement of accounts."

In the 16th paragraph of the plaint the cause of action is stated to have arisen from November 1903, and I take this to mean that the cause of action arose on the several dates between November 1903 and May 1904 referred to in the 10th paragraph of the plaint as the period during which the collections were made by the plaintiff's and the 3rd defendant's men.

The Lower Courts dismissed the suit on the ground that the dissolution really took place in May 1903 and not in October 1903 as alleged in the plaint and as the suit was brought in July 1906 more than 3 years from the date of the dissolution of the partnership and as the suit was one for a settlement of accounts on the dissolution of a partnership it was barred. I think the plaint is not worded as clearly as it might have been. A reading of the paragraphs Nos. 10 and 16 of the plaint with the relief portion in the 17th paragraph and the schedule thereto shows in my opinion that the plaintiff wanted to get his share of the sums which he alleges were collected by the plaintiff's and the 3rd defendant's men and were received by defendants Nos. 1 and 2 between November 1903 and May 1904. If, then, besides the general prayer for the settlement of accounts of a dissolved partnership there is also a prayer for the recovery of the plaintiff's share of the sums received by two of the partners within 3 years before the suit, the following decisions namely *Sokkanada Vaminundar* v. *Sokkanda Vamunindar*.[1] *Sadhu Narayana Aiyangar* v. *Ramasami Aiyangar*[2] *and Thiruvengada Mudaliar* v. *Sadagopa Mudaliar*[3], seem to apply to such

1. (1904) I. L. R. 28 M. 344 2. (1908) I. L. R. 32 M. 203
3. (1910) I. L. R. 34 M. 112

a prayer and the plaintiff would be entitled to prove what sums have been received by defendants Nos. 1 and 2 within the 3 years before the suit leaving, however an opportunity to defendants Nos. 1 and 2 to show that, if a general account of the partnership transactions is taken, the plaintiff would be found not to be entitled to the share he claims of the amounts received within the 3 years before suit by defendants Nos. 1 and 2. It must be admitted that this aspect of the case was not pointedly put forward by the plaintiff before the Munsif and no issue was raised on this question in the Munsif's Court. But the point seems to have been taken in the grounds of appeal to the Lower Appellate Court—6th grouud—and though there is no definite statement that evidence was shut out by the District Munsiff on the question as to what amounts, had been received by defendants Nos. 1 and 2 between November 1903 and May 1904, it is contended in the appeal memo that " the District Munsif should have tried that question and ought to have given a finding on it." Having in mind the difficult nature of the question of law involved and seeing that it is not unreasonable to suppose that the plaintiff and his legal advisers had only vague ideas of their legal rights in a case of dissolved partnership and of collections made and amounts received by some of the partners after dissolution, I think that it is not improper to allow the plaintiff an opportunity to adduce evidence on that question giving of course a like opportunity to defendants Nos. 1 and 2 not only to meet the evidence which may be adduced by the plaintiff in regard to these alleged collections but also to prove that the plaintiff's share of those collections cannot be recovered by him having regard to the state and result of the general accounts of the partnership. We therefore set aside the decree of the Lower Courts and remand the suit to the Court of first instance for a decision *de novo* not only on the questions arising in the case including the question relating to the amounts received by defendants Nos. 1 and 2 as alleged in the 10th paragraph of the plaint and in the schedule thereto, but on the question of the general state of the accounts if it is necessary to go into that question also.

The Court fees paid by the appellant on the Memorandum of appeal will be refunded to him. Costs incurred in all the Courts will be provided for by the District Munsif in the fresh decision.

Spencer J.:—I concur and have nothing to add.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Gopala Aiyangar — *Appellant.* (Petitioner) Deft.*

v.

1. Venkatakrishna Aiyangar.
2. Narasimha Aiyangar.
3. Gopala Aiyangar.
4. Minor Krishnaswami by guardian 2nd respondent.

— *Respondents.* (Respondents) Plaintiffs.*

Gopala Aiyangar *v.* Venkata-krishna Aiyangar

Promissory note—For the benefit of two members of a Hindu family—Payee dying—Suit by the other member or by all the surviving members—Maintainability of.

Where a promissory note stands in the name of one of the members of a joint Hindu Family who dies leaving a widow and it is found that the note was not taken for the benefit of the family but was taken only for the benefit of the deceased and the 1st plaintiff one other member of the family ;

Held that neither the 1st plaintiff nor all the surviving members could maintain the suit upon it.

Appeal under S. 15 of the Letters Patent against the Order and Judgment of the Hon'ble Mr. Justice Sadasiva Aiyar dated 23rd day of September 1912 in C. R. P. No. 426 of 1911 preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in Small Cause Suit No. 1382 of 1910.

K. V. L. Narasimham and *C. Padmanabha Aiyangar* for Appellant.

K. V. Krishnaswami Aiyar for Respondents.

The Court delivered the following

Judgment :—The promissory note sued upon is executed in favour of the deceased Venkata Varada Aiyangar who has left a widow. The suit is brought by the surviving members of the family to recover the debt on the ground that the debt is due to the family and the bond is taken in the name of the deceased on behalf of the family. There is no finding that the debt was due to the family but it is found that the promissory note was taken for the joint benefit of the 1st plaintiff and the deceased, who constituted " a family partnership" and therefore the 1st plaintiff as the survivor is entitled to sue. As the bond is taken only in the name of Venkata Varada Aiyangar and it is not found to be for the benefit of the family, we are of opinion that the 1st plaintiff is not entitled to maintain the suit, *Subba Narayana Vaithiyar* v *Ramaswami Iyer*[1].

We must therefore set aside the decree of the learned Judge and dismiss the suit. Each party will bear his own costs throughout.

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* L. P. A. No. 226 of 1912. 23rd January 1914.

1. (1906) I. L. R. 30 M. 88.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji

R. M. P. S. Muthiah Chettiar and others... *Petitioners**.

v.

Authinamulagi and others — *Resdondents.*

Muthiah Chettiar *v.* Authinamulagi

Provincial Small Cause Courts Act S. 28—Suit for rent—Denial of plaintiff's right to Kudivaram and consequently right to sue in Civil Courts—Denial of plaintiff's right as trustees.

In a suit for rent by the trustees of a temple, defendants denied the title of the plaintiff's to sue as trustees.

Held that being a question which the Small Cause Court could not finally determine, the Court could appropriately return the plaint under S. 23 of the Provincial Small Cause Courts Act.

Semble The Court could also return the plaint under that section when the defendants contend that the temple did not own the Kudivaram and that the suit could be brought only in the Revenue Court.

Petitions under S. 25 of Act IX of 1887 praying the High Court to revise the orders of the Court of the Subordinate Judge of Ramnad in Small Cause Suits Nos. 612 to 614 and 616 to 624 and 626 to 688 of 1910.

S. Varadachariar for K. Srinivasa Aiyangar and *A. Krishnasami Aiyar* for Appellants.

T. Rangachariar for Respondents.

The Court delivered the following

Judgment:—The Subordinate Judge as a Small Cause Court has returned the plaints under S. 23 of the Provincial Small Cause Courts Act because the "relief claimed" by the plaintiffs cannot be granted by the Small Cause Court without determining the question whether plaintifts have the kudivaram right in the plaint lands. The determination of that question is necessary owing to the defendant's questioning the jurisdiction of the Small Cause Court (which is a Civil Court) defendants contending that the Revenue Courts alone have jurisdiction.

Ultimately, therefore, as the "relief claimed" by the plaintiffs cannot be granted by the Small Cause Court without deciding the question of plaintiffs' title to the kudivaram it is not inappropriate to say that the decision as to the grant of that relief "depends upon the proof or disproof of a title to immoveable property" within the

*C. R. P. Nos. 744 to 746 and 748 to 819 of 1910, 10th December 1913.

Muthiah Chettiar v. Authinamulagi

words of S 24 of Act IX of 1887. Mr. Varadachariar for the petitioners in revision contends that the relief itself for the recovery of rent does not depend upon the proof or disproof of plaintiff's kudivaram title but it is only the jurisdiction of that particular court as a Civil Court to grant such relief that so depends upon the proof or disproof of the kudivaram title and hence S. 23 does not apply. We hold (though not without hesitation) that this contention cannot be accepted. The reason for the rule enacted in S. 23 seems to be that, where it is considered advisable by a Small Cause Court that a final decision on a question of title, which decision would, if given by an original court, ordinarily be subject to appeal and even to Second Appeal and which decision would ordinarily be *res judicata* between the parties should be given in the particular case before the Small Cause Court by an Original Court the Small Cause Court, though competent to decide incidentally the question of title in that particular case, might exercise with discretion the power of returning the plaint to be presented to the Original Court which would have jurisdiction to so decide on that title finally. That reason applies also to cases where a question as to jurisdiction between Revenue and Civil Courts depends on the title to immoveable property disputed between the parties. We therefore hold that the Subordinate Judge's order under S. 23 was not illegal or passed without jurisdiction.

Even if we are wrong in the above view the defendant (or at least some of them) in their written statements have denied plaintiff's title as trustees of the temple to sue for the rent and such title as trustees is, again, a title which a Small Cause Court cannot finally determine and on that ground also the return of the plaints (or at least those plaints against which that contention was raised) can be justified.

We therefore dismiss these revision petitions.

Costs will abide. In one of the petitions (C. R. P. 768 of 1910) in which the Respondent died and which has abated there will be no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

Present:—Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair, and Mr. Justice Oldfield.

Madurai Pillai — *Petitioner** *(Plaintiff)*

v.

T. Muthu Chetty — *Respondent* *(Defendant).*

Presidency Small Cause Court Rules—Order 41 r. 2 Ultra vires—Practice or Procedure—Right to apply for new trial, not—Authority to make rules—Extent of—Abridging rights conferred by statutes—If competent.

Order 41 r. 2 of the Presidency Small Cause Courts Rules which requires an applicant for new trial to either deposit the decree amount or furnish security is *ultra vires*. Madurai Pillai *v.* Muthu Chetty

Per Chief Justice:—The authority of the High Court to make rules regulating the practice and procedure of the Small Cause Courts does not extend to abridging the right to apply for new trial conferred by the statute which is a substantive right and not a mere matter of practice or procedure.

Where a power to make regulation is given by a statute the general rule is that no regulations made under the statute can abridge a right conferred by the statute itself but if the rules are within the power expressly conferred, they would be good even if they purported to abridge the rights given by the statute.

Petition under Section 115 of Act V of 1908 praying the High Court to revise the order of the Court of Small Causes, Madras, in Full Bench Application No. 96 of 1912, in Small Cause No. 12034 of 1912, dated 25th November 1912.

C. Krishnamachariar for *K. Bhashyam Aiyangar* for Petitioner.

P. M. Sivagnana Mudaliar, for respondent.

The Court (*Sankaran Nair* and *Ayling*, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Sankaran Nair J:—A decree was passed against the petitioner by a single judge of the Madras Court of Small Causes. He made an application to the Small Cause Court to order a new trial and to set aside the decree, under section 38 of the Presidency Small Cause Courts Act, 1882. That application was rejected by the Full Bench on the ground that the full amount under the decree was not paid at the time of presenting the application, as required by O. 41, r. 2 of the Presidency Small Cause Court rules. The petitioner now applies to this Court to set aside the order of the Small Cause Court, on the ground that the rule above referred to is *ultra vires*,

* C. R. P. No. 952 of 12 — 5th January 1914.

as it contravenes section 38 of the Presidency Small Cause Courts Act and that, therefore, they were wrong in rejecting his application.

Section 38 runs in these terms:"Where a suit has been contested, the Small Cause Court may, on the application of either party, ...order a new trial to be held, or alter, set aside etc". Order 41 Rule 2 runs in these terms—" No application shall be entertained, unless the applicant shall, at the time of presenting his application, either deposit in Court the amount due from him under the decree or order, or give security to the satisfaction of the Court or the Registrar, for the performance of the decree or order in respect of which the application is made". The general rule is that, where a power to make regulations is given by a statute, no regulations made under it can abridge a right conferred by the statute itself. [See *Reg* v. *Bird*: *Needles, ex parte*[1]. Now in this case, the section confers no right upon the petitioner himself. He cannot, therefore, complain that any right of his has been taken away by the regulations.

The next question is whether the right which is vested in the Small Cause Courts under Section 39, has been taken away by the regulations. The section states that the Small Cause Court *may* order a new trial; it is not imperative. I am of opinion, that it was open to the Small Cause Court to lay down certain conditions under which alone it would exercise the jurisdiction conferred by that section. If, therefore, the Small Cause Court had framed the rule under which this application of the petitioner was rejected, it would, apparently, be a valid rule. But the rule was made, not by the Small Cause Court, but by the High Court, and the question is, whether it is open to the High Court to cut down the jurisdiction of the Small Cause Court. The rule is said to have been framed by the High Court, " by virtue of the powers conferred by the Presidency Small Cause Courts Act, 1882 and the Acts amending the said Act and of all other powers hereunto enabling". If it is this Act itself that gives power to the High Court to frame rules, then, apparently, the High Court has no power to cut down the jurisdiction. The section in the Small Cause Courts Act under which these rules are framed, is apparently Section 9 of the Act That section places the Small Cause Court under the jurisdiction of the High Court, for the exercise of the powers which are conferred upon it by the Letters Patent, by the Civil Procedure Code, the Legal Practitioners Act and 24 and 25 Victoria Ch. 104 Section 105. Now if that is the only section under which the High Court can frame these

1. (1893) 2 Q. B. 340.

rules, then, as I have said before, I am disposed to think that the High Court had no jurisdiction to frame this rule.

But apart from the Small Cause Courts Act, the High Court has certain powers over the Civil Courts in the Presidency, under the enactments and Letters Patent above referred to, and the rules are also said to have been framed under all other powers enabling the High Court to make the Rules. Therefore the question arises, whether apart from section 9 of the Small Cause Courts Act, the High Court had not the power under the other provisions of law to make the rule in question. The question has not been argued before us Such power, if vested in the High Court under the above provisions of Law, cannot be taken away by implication. If the Indian Legislative Council is entitled to cut down the power of the High Court, then it must be done by express enactment and not by implication. I have also considered the question, whether the Small Cause Court, having acted under these rules or rules similar to these framed under the same powers, from 1882 up to this date, may not have impliedly accepted the rules as their own. But I am not able to accept this suggestion. The mind of the Small Cause Court was never directed to that question, and they never considered whether they had the right to accept or discard these rules. The question is one of great importance and affects the procedure of the Court and might affect the validity of numerous decisions. I therefore refer to a Full Bench the question, whether Order 41, Rule 2 of the Presidency Small Cause Court rules is *ultra vires*.

Ayling, J.:—I agree to the reference proposed by my learned brother.

Mr. C. Krishnamachariar for *Mr. K. Bhashyam Aiyangar*. This is an application to revise the order of the Full Bench of the Presidency Court of Small Causes, declining to entertain the application of the petitioner against the decree passed by the 3rd Judge in Suit No. 12034 of 1912 on the ground that the petitioner not having deposited the decree amount and costs as required by O. 41 R. 2 of the Small Cause Court rules of 1912.

The rule requiring the petitioner to deposit the decree amount and costs is *ultra vires*. S. 38 of the Presidency Court of Small Causes gives the party in every contested suit, the right to apply to the Full Bench of the Court of Small Causes for an order for retrial. The only condition imposed by the section of the Act which confers the right is that the application should be made within eight days. O. 41 R. 2 has the effect of imposing a further condition on the

right given by the Act. It restricts a right conferred by the Act; the right given by the Act is in the nature of a right of appeal.

The rules have been framed by the High Court under the power conferred upon it by S. 9 of the Act. The section confers power to frame rules for regulating the practice and procedure for the Small Cause Court.

S. 38 of the Act confers a right. The right being in the nature of an appeal is not a matter of procedure or practice. The right of appeal is distinct from rules of practice or procedure.

A rule which imposes a condition precedent to the exercise of a right is not a rule either of practice or Procedure.

P. M. Sivagnana Mudaliar The rule is a rule of practice and not a restriction on any right conferred on the party. The rule in question is a wholesome rule to prevent vexatious and frivolous applications.

The Court expressed the following

OPINION :—*Chief Justice :*—The question which has been referred to us in this case is,—"Whether Order XLI, Rule 2 of the Presidency Small Cause Court Rules is *ultra vires.*" The rule provides that no application (for a new trial) shall be entertained unless the applicant at the time of presenting the application either deposits in Court the amount due from him under the decree or order or gives security to the satisfaction of the Court or the Registrar, for the performance of the decree or order in respect of which the application is made. The power to grant a new trial in a suit in the Presidency Small Cause Court is regulated by Section 38 which provides " where a suit is contested, the Small Cause Court may on the application of either party made within eight days from the date of the decree or order in the suit, order a new trial to be held, or alter, set aside or reverse the decree or order upon such terms as it thinks reasonable." The Rules of the Presidency Small Cause Court are made under the powers conferred by Section 9 of the Presidency Small Cause Courts Act of 1882. Under the Act as it originally stood, there was a power in the Small Cause Court itself, with the previous sanction of the High Court, to make rules. In 1895 that Section was repealed and the power to make rules was given to the High Court. The terms of the section which empowers the High Court to make rules in reference to the Small Cause Court are very wide. The general rule is, no doubt, that stated in the case referred in the order of reference, *Queen* v. *Bird* : *Needles*

exparte[1], that is, "where a power to make regulations is given by a statute, no regulations made under the statute can abridge a right conferred by the statute itself." That is the general rule. But if by statutory enactment a power is given to a rule-making authority to make rules, the rules, as it seems to me if they were within the power given, would be good even if they purported to abridge the rights given by the statute.

I think the only question we have to decide is, is this Rule within the powers conferred upon the High Court by the section which was introduced into the Act in 1895 ? Now whatever may be the true construction of this section, one thing seems clear and that is, it only empowers the High Court to make rules with reference to matters of practice or procedure. It cannot, as it seems to me, be suggested that the terms of the section are wide enough to give this Court power to make rules with regard to matters of substantive right, or matters which are not practice or procedure. Then the question is,—can it be said that the right to apply for a new trial is a matter of practice or procedure? Section 38 which regulates this question of new trials, is, perhaps, somewhat curiously worded. It does not say in so many words that a party has the right to apply for a new trial." It says that "the Small Cause Court may, on the application of the party, order a new trial" But I think on the true construction of the section it gives a right to a party to apply for a new trial.

As regards the right of appeal, the right of appeal being a creature of that statute, I think it is well settled that a right of appeal is not a practice or procedure. I may refer to certain observations made by Lord Westbury in a case to which our attention has been called, *Attorney General* v. *Sillen*[2]. The Lord Chancellor thus describes the right of appeal: he says "the right of appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal." Our attention has also been called to a decision of the House of Lords, *Colonial Sugar Refining Company* v. *Irving*[3], in which there is an observation by Lord Macnaughten:—"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure." Now can we draw any distinction between a right of appeal conferred by statute and the right to apply for a new trial ? I think we cannot. Our attention has not

1. (1898) 2. Q. B. 843. 2. (1864) 11 Eng. Rep. 1200 at 1209.
3. (1905) A. C. 369.

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White C. J.

been called to any case in which any such suggested distinction has been drawn, nor to any case in which it has been held that the right to apply for a new trial is a matter of practice or procedure. Of course, there is no objection to the Small Cause Court, if they think fit making it one of the terms which they are entitled to impose when they make on order for a new trial, that the condition imposed by Order XLI, Rule 2 should be satisfied before they grant the application. But to say that the Small Cause Court has the power to do that is a very different thing from saying that the rule in question is a rule of practice or procedure and within the powers conferred by section 9. The preamble to the Rules states that they are made " by virtue of the powers conferred by the Presidency Small Cause Courts Act of 1882 and of all other powers hereunto enabling, the High Court .. Our attention has not been called to any power in the High Court in this connection outside the powers conferred by Section 9 of the Presidency Small Cause Courts Act.

One word with regard to the case of *Morgan* v. *Bowles*[1] which was cited in argument in support of the contention that the rule is bad. I do not think that either this case or the case of *West Devon Great Consols Mines* [2], affords us any assistance with reference to the question as to whether the rule in question here is *ultra vires* or not. *Morgan* v. *Bowles*[1] had reference to a provision of an Act which imposed an obligation on a party appealing to give security for costs. Then certain rules were passed which did not reproduce this provision and it was held that the obligation to give security for costs under the Act continued. That case was decided upon the question of construction on the ground that the words of the rule did not abrogate the provision of the Act with reference to security for costs.

In *West Devon Great Consols Mines*,[2] Lord Bowen said with regard to this matter: " The rule 'generalia non specialibus derogant' applies and he decided the question purely as one of construction. And Lord Justice Cotton in his judgment says: " Assuming, without deciding, that the Rule Committee had power to take away this condition with regard to the security for the costs or with regard to the deposit, they had not purported to do so."

It seems to me, for the reasons I have stated, the answer to the question referred to us is that the rule is *ultra vires*.

Sankaran Nair J.:—I agree that the rule is *ultra vires*.

Oldfield J.:—I concur.

1. (1894) 1 Q. B. 236.

2. (1888) 38 Ch. D. 51.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Karuppanna Goundan — *Appellant Petitioner**.

v.

Kandaswami Goundan and others — *Respondents. (Respts.).*

Criminal Procedure Code S. 147—Order under S. 144—If bar—No interference by High Court unless apprehension of breach of the peace unreasonable—Public right of way within section.

An order under S. 147 Cr. Pr. Code is not liable to be set aside merely on the ground that an order under S. 144 has already been made in respect of the same matter unless the Court considers that the Magistrate's apprehension of breach of the peace is altogether unreasonable in the circumstances of the case.

Karupp Gounc *v.* Kandas Gounc

There is no foundation for the view that public rights of way do not come within the section.

Order to remove obstruction to public pathways can validly be passed under S. 147.

Appeal under Clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Ayling dated 26th September 1913 in Criminal Revision Case No. 607 of 1913 presented against the order of the Divisional 1st Class Magistrate of Karur in Miscellaneous Case No. 42 of 1912.

T. V. Muthukrishna Aiyar, for Appellant.

T. Natesa Aiyar for Respondents.

The Court made the following

Order:—The contention of the appellant (see the 3rd ground in the appeal memorandum) is that because on the 20th November 1912 an order had been passed by a 2nd class Magistrate under S. 144 of the Cr. P. C. prohibiting the other party going through the old pathway in the appellant's land there was no likelihood of a breach of the peace on 25th November 1912 and hence the proceedings of the Sub-Divisional Magistrate taken under S. 147 (the proceedings having been begun on 25th November 1912) were without jurisdiction.

But if the Sub-Divisional Magistrate really thought that notwithstanding the order under S. 144 of the Crl. P. C. (passed within a week before his taking steps under S. 147 of the Crl. P. C.) the likelihood of a breach of the peace still existed, we do not think

*L. P. A. No. 102 of 1913. — 4th February 1914.

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that it could be argued that the Magistrate was legally incompetent to entertain such a thought and hence was legally incompetent to take action under S. 147. No doubt, we, as a court of revision, might interfere if we consider that his apprehension was quite unreasonable but we are not satisfied that it was so unreasonable.

The next contention is that as the appellant had obstructed the pathway by a fence the Magistrate had no jurisdiction under S. 147 of the Cr. P. C. to order the appellant "not to obstruct" the pathway which order is tantamount to a direction that the appellant shall pull down the fence. The case of *In re Lindsay*[1] and the case of *Latchmiah Maistry In re*[2] are relied on for the above contention. In *In Re Lindsay*[1] it was held that where the obstruction to the path was a permanent one consisting of a wire fence, a trench and a wall and the order of the Magistrate was passed exparte without due inquiry such an order was not a proper order to be passed under the old S. 532 (corresponding to S. 147). The learned Judges held that the proper course was to take action under the sections relating to public nuisances (Chapter X of the present Code). That case might be distinguished on the ground that the obstruction in this case was a flimsy fence but whether it is so distinguishable or not we are not prepared to follow it if it was intended to decide therein that the fact that S. 133 of the Crl. P. C. expressly provides for an order by the Magistrate directing the removal of obstruction to pathways necessarily implies that a similar order cannot be passed in proceedings taken under S. 147 of the Crl. P. C. The same remark applies to the similar *Obiter dictum* in *Latchmiah Maistry In re*[2].

We do not think that the doubts entertained in some cases whether S. 147 of the Crl. P. C. can be applied when the right of way claimed is a right to a public path and not a private path have any sustainable foundation. The terms of the section are wider enough to cover such disputes also.

Finally we might state that revision under Ss. 435 and 439 of the Crl. P. C. is a matter of discretion (that is, this Court is not bound to interfere even if the Magistrate's order sought to be revised was an illegal order) and it would require a very strong case for a Letters Patent appeal to succeed against the decision of a single Judge of this Court refusing to interfere in revision.

We therefore dismiss the appeal.

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1. (1881) I. L. R. 4 M. 121. 2. (1898) 1 Weir 143, 144.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

The Assistant Sessions Judge of N. Arcot... *Petitioner.**

v.

Ramaswami Asari... *Accused.*

Criminal Procedure Code Ss. 179, 188—Former not subject to latter—Criminal breach of trust by British subject committed outside British India—Loss sustained within—Political Agent's certificate not necessary.

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S. 179 Cr. P. Code is not subject to S. 188 and therefore, an offence of criminal breach of trust committed by a British subject outside British India is triable in British India without a certificate of the Political agent if the loss consequent upon the criminal breach of trust was sustained in British India.

Per *Sadasiva Aiyar* J: None of the Sections 179 to 184 need be read subject to S. 188.

Petition praying that in the circumstances stated in the order of reference the High Court will be pleased to quash the commitment of the accused in Sessions Case No. 96 of 1913 (P. R. No. 1 of 1913 of the Sub-Divisional 1st class Magistrate, Tiruvannamalai).

S. Swaminathan (for *Public Prosecutor*) on behalf of the Crown.

R. N. Aiyangar, instructed by *Messrs. Grant* and *Gretorex*, for the accused.

The Court made the following

Order :—*Spencer* J.—I think that the Assistant Sessions Judge is mistaken in supposing that the Deputy Magistrate had no jurisdiction to commit the accused for trial before him for want of a certificate under S. 188 Crl. P. C. The complainant is alleged to have entrusted certain jewels at Vellore to the accused a Native Indian subject of His Majesty, for sale on commission for him and the accused is alleged to have dishonestly converted the jewels concerned with the first two counts to his own use by pledging them at Bangalore City and to have dishonestly misappropriated the jewels concerned in the third count at Madras. It was apparently part of the arrangement that the accused should account for the jewels to the complainant at Vellore, or return them or their price at Vellore. His failure to account for the property was a part of the offence, acts including illegal omissions. The loss which was the consequence which ensued occurred at Vellore and this is sufficient

*C. M. P. No. 546 of 1913. 10th February 1914.

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Spencer J.

under S. 179 Crl. P. C. to give jurisdiction to the Sub-Divisional Magistrate of Tiruvannamalai to commit the case to the Sessions as directed by this Court in Crl. R. C. 191 of 1913. See *Queen Empress* v. *O'Brien*[1] and *Langridge* v. *Atkins*[2] which explains the case of *Sirdar Meru* v. *Jethabhai Amirbhai*[3]

The illustration (d) to this section is an instance of a criminal act done outside British India and the consequence of the offence ensuing in British Territory.

The decision of *Reg* v. *Adivigadu*[4] based on the Code X of 1872, and relied on by the Assistant Sessions Judge has been superseded by the amendment of S. 410 of the I. P. C. by Act VIII of 1882. The same remark applies to *Empress* v. *Moorga Chetty*[5].

In *Imperator* v. *Tribhun*[6] certain observations are made by two Judges of the Sind Judicial Commissioners' Court to the effect that S. 181 (2) applies only as between courts of local jurisdiction in British India and is governed by the provisions of S. 188 Crl. P. C. A similar observation was made by a single Judge of this Court as regards S. 180 in *Sessions Judge, Tanjore* v. *Sundara Singh*[7]. But our attention has not been drawn to any decision to the effect that S. 179 must be read as subject to S. 188; and the illustration to the section is against such a theory. Even as regards Ss. 180 and 181 the decision in *Emperor* v. *Baldewa*[8] shows that a British subject who commits a robbery in a Native State and dishonestly retains stolen property in British India can be tried in a British court even without a certificate under S. 188 and this throws doubt on the correctness of the observations in *Imperator* v. *Tribhun*[6] and *Sessions Judge, Tanjore* v. *Sundara Singh*[7]. Moreover the words "or the offence was committed" in S. 181 (2) and the words "when a Native Indian subject......commits an offence" in S. 188 seem to indicate that the latter section is exclusive of the rule as to jurisdiction arising out of the receipt or retention of misappropriated property.

In the cases of *Queen Empress* v. *Kattaperumal*[9] and *Emperor* v. *Kalicharan*[10] it does not appear that there was any retention of stolen property in British India.

In Crl. M. P. No. 97 of 1911 a Native Indian subject of His Majesty was charged with abetment of an offence which was com-

1. (1896) I. L. R. 19 A. 111.
2. (1912) I. L. R. 35 A. 29.
3. (1906) 8 Bom. L. R. 513.
4. (1876) I. L. R. 1 M. 171.
5. (1881) I. L. R. 5 B. 338.
6. 8 Crl. L. J. Rep. 530.
7. (1910) M. W. N. 143.
8. (1906) I. L. R. 28 A. 372.
9. (1889) I. L. R. 13 M. 423.
10. (1902) I. L. R. 24 A. 256.

mitted in British India and the commitment was quashed for want of a certificate under S. 188. In this case the only act for which the accused could have been tried was the act of instigation and that took place wholly outside the jurisdiction of British Courts. This decision to some extent supports the theory that S. 180 is governed by S. 188 and it declares that the object of the former section is to give jurisdiction to a court when the offence is not committed within its limits but within the limits of some other British Indian Court. While doubting the correctness of this view when the words of the two sections do not contain anything directly to that effect, I prefer to base my decision upon S. 179 Crl. P. C.

I must therefore decline to interfere with the order of commitment in this case.

Sadasiva Aiyar J :—I agree entirely. The scheme of Chapter 15 sub-chapter (A) in which Ss. 177 to 189 appear seems to me to be intended to enlarge as much as possible the ambit of the sites in which the trial of an offence might be held and to minimise as much as possible the inconvenience which would be caused to the prosecution, by the success of a technical plea that the offence was not committed within the local limits of the jurisdiction of the trying court. Ss. 178 to 184, all confer more extended powers and larger jurisdiction to Courts than would belong to them if the ordinary rule found in S. 177, (namely, that the enquiry and trial shall take place in the court within the local limits of whose jurisdiction the offence was committed), were carried to its strict logical conclusions. S. 188 comes in (almost at the end of the sub-chapter A) *to make three further encroachments on the general rule of* S. 177 by enacting that

(*a*) Where the criminal is a Native Indian Subject of His Majesty and he commits any offence even beyond British India ;

(*b*) Where the criminal is a British subject and he commits an offence in a Native State ; and

(*c*) Where a servant of the King Emperor (whether a British subject or not) commits an offence in a Native State, the offender in all these three cases can be tried *at any place where he is found in British India* provided that the Political Agent certifies that the charge ought to be inquired into in British India or the Local Government sanctions such inquiry. Surely, the proviso to S. 188 (which section comes in after Ss. 178 to 187) could not have been intended to restrict the enlarged liberties and privileges as regards jurisdiction given to the Courts by the previous sections. I

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Sadasiva Aiyar J.

should think that Sec. 188 which follows Ss. 179 to 187 was intended rather to draw into the net of the jurisdiction of the British Indian Courts cases, which *notwithstanding the full use of Ss. 179 to 184* could not be brought within the jurisdiction of any British Indian Court than to restrict by its 1st proviso the extended jurisdictional privileges conferred by Ss. 178 to 184 on courts which according to the ordinary rule of Sec. 177 would not have had jurisdiction. The proviso to Sec. 188 will come into operation only when the British Indian Court cannot get jurisdiction under Secs. 179 to 184 and has to depend on the first part of Sec. 188 to get such jurisdiction. I therefore with great respect, dissent from the decisions in *Imperator* v. *Tribhun*[1] and *Sessions Judge Tanjore* v. *Sundara Singh*[2]. As regards the decision in Crl. M. P. 97 of 1911, while it could be distinguished (as pointed out by my learned brother) as affecting only Sec. 180 of the group of Ss. 179 to 184, I feel loath to make any such distinction as no difference in principle can be made between the extended jurisdiction conferred by Sec. 180 and the extended jurisdiction given by the other sections.

I therefore respectfully dissent from that decision also and refuse to accept the Sessions Judge's reference.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Annamalai Velan and others — *Appellants** *(Plaintiffs.)*

v.

Murugappa Velan and others — *Respondents* *(Defendants.)*

Rent Recovery Act S. 39—Sale for arrears of rent—Suit to set aside—Purchaser alone necessary party—Melwaramdar or receiver in suit of Melwaramdars—Limitation Act, (Act IX of 1908) Addition of proper but not necessary party—Effect of.

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To a suit brought to set aside a rent sale the only necessary party is the purchaser and the suit is not liable to be dismissed on the ground that when the landlord is made party more than one year has elapsed from the date of sale.

Distinction between necessary party and proper party pointed out.

Second Appeal against the decree of the District Court of Tanjore dated 21st April 1909 in A.S. No. 226 of 1909 preferred against the decree of the Court of the District Munsif of Pattukota in O.S. No. 812 of 1905.

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*S. A. No. 1356 of 1909. 27th January 1914.

1. 8 Crl. L. J. Rep. 530.
2. (1910) M. W. N. 143.

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iyar for Appellants

ts.

appellants in this second cancellation of a rent sale represented the Melwaramdars of certain lands ... such Melwaramdar bacame the landlord of the plaintiffs and of the 1st defendant who were brothers. The rent sale was held on the footing that the 1st defendant was the tenant owning the Kudivaram right after notice to him under S. 39 of the Rent Recovery Act VIII of 1865 (now superseded). The plaintiffs' contention is that the 1st defendant did not own the Kudivaram right on the date of notice under Sec. 39 that in a partition effected between the plaintiffs and the defendants about 1890, the plaint land and trees fell to the plaintiffs' share that the proceedings connected with that rent sale cannot bind the plaintiffs as they were not made parties to the said sale proceedings and they were not given notice under Sec. 39 of Rent Recovery Act and the notice given to the 1st defendant will not bind them, and that there was no muchilika attached or sale proclamation with regard to plaint lands and trees." In the suit, they joined about 80 persons as defendants, the defendants Nos. 3 to 80 being the Melwaramdars of the village in which the plaint lands are situated. One of the defences raised by these melwaramdars was that as a receiver had been appointed in O. S. No. 8 of 1901 on the file of the Subordinate Judge's Court of Tanjore to be in possession of the entire melwaram rights of all the melwaramdars till the disposal of that suit and as it was that Receiver who gave the notice under Sec. 39 of the Rent Recovery Act and brought the plaint properties to sale in the auction in which the 2nd defendant purchased them, the said receiver was a necessary party-defendant to the suit and the suit was bad for non-joinder of that necessary party. The District Munsif overruled this contention on the ground that the receiver had no personal interest in the subject matter of the present suit and the melwaramdars (defendants Nos. 3 to 80) and the purchaser 2nd defendant were the persons directly interested. On appeal, the District Court of Tanjore held that the receiver was a necessary party. Its reasons are " that a Receiver's acts are not necessarily or probably for the benefit of each of the parties to the proceedings, that he is not the representative of any or all of them, but of the Court and of the estate, the ownership of which is uncertain ; that the object of his appointment is to provide a provisional represen-

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tative of the estate, 'title in dispute arising plaintiff would go behind waramdars themselves." the suit to the District Mun plaintiffs an opportunity to fendant. When the Receiver ...nal defendant more than one year had elapsed ... of the rent sale and the District Munsif dismissed the whole suit as barred by limitation as the necessary party, the defendant Receiver, was impleaded only after the period of one year prescribed by article 12 (b) of the Limitation Act. This second decision of the District Munsif's Court dismissing the suit as barred by limitation was confirmed by the District Judge on appeal. In the second appeal before us, various contentions have been raised, but we think it is necessary to set out only the 6th and 8th grounds of the appeal memo which are as follows :—" 6. The Receiver being an unnecessary party, the lower appellate Court has erred in directing the plaintiff to add him as a party and then to dismiss the whole suit on the ground of limitation.

" 8. The lower appellate court has erred in remanding the case. It should have disposed of the case on the merits."

We are of opinion that none of the melwaramdars nor the receiver is a necessary party to this suit to set aside a rent sale and that it is only the 2nd defendant the purchaser at the rent sale who is a necessary party defendant. A landlord who under the Rent Recovery Act VIII of 1865 takes steps by the issue of notice under Sec. 39 or otherwise to bring the tenant's property to sale is not a party to the sale. Nor is such a sale held in execution of any decree to which he is a party. He has only to send a duplicate of the notice under Sec. 39 to the Collector with an endorsement stating the date of service of the notice and the mode of service effected and the Collector proceeds to sell the property under Ss. 40, 18, 33, and 35 of the Rent Recovery Act, (Sec. 40 making the other sections which directly relate to the mode of sale of immoveable properties also apply to the mode of sale of immoveable properties). There is no provision in the Act indicating that the landlord who brings about an illegal or irregular sale is a necessary party to a suit brought in the Civil Court to have the sale set aside. Under O. 1 R. 3. C. P. C., the proper persons to be joined as defendants in a suit are those " against whom any right to relief in respect of or arising out of the same act or transaction or series of

acts or transactions is alleged to exist, whether jointly, severally or in the alternative." When the sale of the Kudivaram right in a land takes place under the auspices of the Collector under the Rent Recovery Act and the tenant (the owner of the Kudiwaram right) brings a suit to set aside that sale, the relief (the granting of which establishes or re-establishes the title of the plaintiff when so granted will affect only the purchaser at the rent sale and no other person and hence the right to such relief exists only against the rent auction purchaser. In the case of a sale under the Civil Procedure Code in execution of a decree, the setting aside of the sale will affect the decree holder also, as under Order 21 rule 93 if the sale is set aside, he cannot take or retain the purchase money towards his decree amount and he will be further be delayed in obtaining the fruits of his decree. Hence to proceedings under Order 21, rule 90 he has been held to be a necessary party. Sales under the Rent Recovery Act, however, stand on a different footing. In *Bal Mokoond Lall* v. *Jirjudhun Roy*[1] the question was considered whether in a suit to set aside even a revenue sale, the Collector was a necessary party under the Bengal Act XI of 1859. We shall quote the following paragraphs of *Mr. Justice Mitter's* judgment which on this point was concurred in fully by *Norris* J.: " Then a question was raised to the effect that the plaintiff was bound to make the Secretary of State a party in this suit, and in support of the appellant's contention upon this point our attention was drawn to the provisions of S. 35, Act XI of 1859. That section says :—' In the event of a sale being annulled by a final decree of a Court of Justice, and the former proprietor being restored to possession, the purchase money shall be refunded to the purchaser by Government, together with interest at the highest rate of the current public securities." Comparing this section with the analogous section in Regulation VIII of 1819, viz., Sec. 14, which is to the effect that " the purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale, the court shall be careful to indemnify him against all loss, at the charge of the Zemindar or person at whose suit the sale may have been made'. It appears to me that this Sec. 35 by itself does not afford any ground for the contention that the Secretary of State was a necessary party to the suit. It merely provides that in the event of a sale being annulled by a final decree of a Court of Justice, and the former proprietor being restored to possession, the purchase money shall be refunded to the purchaser by Government, together with

1. (1882) I. L. R. 9 C. 271.

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interest at the highest rate of the current public securities. But it appears to me to be clear that Sec. 35 does not afford any support to the contention raised before us, yet it is by no means clear that the Government was not interested in the question raised in the suit because, if the sale be set aside, the Collector will have to proceed *de novo* in the matter for the realization of the arrears of revenue. The Government, therefore, have such interest in the suit as would on their application, entitle them to be made a party to it." Thus it was held that the Secretary of State is not a necessary party to the suit even if the Government would have to refund the purchase money if the sale was set aside. But as the Government was *interested* in the result of the suit by reason of the provision that the Government should refund the purchase money in the event of the sale being set aside, the Government on *their application* may be made a party to the suit. This view of the position of a person who brings about and conducts a revenue sale under the Bengal Act applies, it seems to us, *a fortiori* to the case of the person who brings about and conducts a rent sale under Act VIII of 1865. In *Balkishen Das* v. *Simpson*[1] their Lordships of the Privy Council had to deal with an objection raised by the respondent that the Secretary of State for India had not been joined as a party to the appeal before them in a case which related to the setting aside of a revenue sale. Their Lordships say that in their opinion the position of the Indian Secretary, in cases like the present, is correctly explained by Mr. Justice *Mitter* in *Bal Movkund Lall* v. *Jirjudhun Rao*[2]." It is clear to us that but for the provision in S. 315 C. P. C. (Order 21 rule 93) even the decree-holder will not be a necessary party to an application under O. 21 rule 90 or O. 21 rule 91 to set aside a court auction sale and because the general rule of *caveat emptor* was relaxed in favour of a court auction purchaser in Order 21 rule 91 and Order 21 rule 93, the decree-holder is a necessary party in applications to set aside court auction sales. The order of remand, therefore, by the District Court, cannot be supported but it need not be set aside at this stage. Neither the Melwaramdars nor the Receiver being necessary parties to the present suit, the addition of the Receiver merely for the purpose of safeguarding their interests (if any), will not make, the provisions of S. 22 of the Limitation Act applicable. (See *Guruvayya* v *Dattatraya*[3].) And the suit brought within the limitation period (assuming as against the plaintiffs the suit has to be brought within one year after the sale) against the only necessary party-defendant (namely the purchaser, 2nd defen-

1. (1898) I. L. R 25 C. 833. 2. (1892) I.L.R 9 C. 271 at p. 276.
3. (1908) I. L. R. 28 B, 11.

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the sale proceeds into the hands of the appellants. The suit was barred by the provisions of Ss. 244 and 295 of the Code of Civil Procedure.

Eddis on behalf of the respondents contended that the lien of the second mortgagee remained intact and that the first mortgagee was a kind of trustee for the next mortgagees The effect of a sale under a power of sale is to destroy the equity of redemption on the land and to constitute the mortgagee exercising the power a trustee of the sale proceeds after satisfying his own charge, first for the subsequent encumbrancers and ultimately for the mortgagor. The case was clearly governed by art. 132 of the Limitation Act of 1877 and could not possibly come under the provisions of Art. 120 nor did Ss. 244 and 295 of the Code of Civil Procedure apply.

Reference was made to *Raja Kishun Dutt Ram* v. *Raja Mumtaz Ali Khan*[1], *Palamble* v. *Khemu*[2], *Jogesher Bhagal* v. *Ohanesham Das*[3], *Kemai Kanta Sen* v. *Abdul Bukul*[4].

The Judgment of their Lordships was delivered by

Sir John Edge:—This Appeal has arisen in a suit which was brought by the Plaintiffs on the 17th November 1900, in the Court of the Subordinate Judge of Monghyr, to enforce payment of principal moneys and interest which were charged upon immoveable property by a deed dated the 19th September 1887, by which one Kalu Babu mortgaged to the Plaintiffs Mouzah Chak and other properties. The mortgage money was repayable on the 18th November 1888. By the suit, so far as it concerned the Defendants Barhamdeo Prasad and Ram Sumran Prasad, the Plaintiffs sought a decree against them for Rs. 12,197-8-3, together with interest, on the ground that they were in possession of a sum of Rs. 12,197-8-3, which had been deposited in the Court of the Subordinate Judge of Monghyr, and was the balance remaining over of the purchase money of Mouzah Chak, after satisfying a decree for sale of that Mouzah of the 8th October 1890, such possession having been obtained by them wrongfully with full knowledge that it was affected with a charge to the Plaintiffs under a mortgage of Mouzah Chak. Barhamdeo Prasad, now dead, is represented in this Appeal by his brother, Ram Sumran Prasad. The only question in this Appeal is whether the suit so far as it related to Barhamdeo Prasad and Ram Sumran Prasad was a suit to enforce payment of money charged upon immoveable property within the meaning of Article 132 of the Second Schedule of the

1. (1879) L. R. 6 I. A. 145, 160.
2. I. L. R. 18 B. 584.
3. (1900) 5 C. W. N. 350.
4. I. L. R. 27 C. 180.

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Indian Limitation Act, 1877, or was a suit to which Article 120 of that Schedule applied.

The facts, briefly stated, are as follows: On the 21st May 1887, Kalu Babu mortgaged Mouzah Chak and other properties to Barhamdeo Prasad and Ram Sumran Prasad. On the 19th September 1887, Kalu Babu mortgaged Mouzah Chak and other properties to the Plaintiffs, and on the 19th July 1889, Kalu Babu further mortgaged Mouzah Chak to Barhamdeo Prasad and Ram Sumran Prasad. On the 8th October 1890, Barhamdeo Prasad and Ram Sumran Prasad obtained a decree for sale on their mortgage of the 21st May 1887. To the suit in which that decree was obtained the Plaintiffs in this suit were made parties, but they did not appear. In execution of the decree of the 8th October 1890, Mouzah Chak was sold. After satisfying that decree a balance amounting to Rs. 12,197-8-3 of the moneys which were realised by the sale of Mouzah Chak remained, and that balance was deposited in the Court of the Subordinate Judge of Monghyr. On the 14th January 1891, Barhamdeo Prasad and Ram Sumran Prasad obtained a decree for sale on their mortgage of the 19th July 1889, and in execution of that decree they, on the 22nd April 1892, drew out of Court the balance of Rs. 12,197-8-3 which had been deposited in Court. Barhamdeo Prasad and Ram Sumran Prasad were well aware of the existence of the plaintiffs' mortgage and that it had priority to the charge they were seeking to enforce, but they did not make the Plaintiffs parties to the suit, nor did they give them notice that under the decree of the 14th January 1891 they were drawing out of Court the balance of Rs. 12,197–8–3.

On behalf of Barhamdeo Prasad and Ram Sumran Prasad it was contended in the Court of the Subordinate Judge that this suit, so far as it related to the claim of the Plaintiffs against them in respect of the Rs. 12,197–8–3, surplus moneys of the sale of Mouzah Chak, was barred by limitation; their contention on the point of limitation was that Article 120, and not Article 132, of the Second Schedule of the Indian Limitation Act, 1877, applied to that claim. They also raised various other contentions in the Court of the Subordinate Judge to which it is not now necessary to refer. The Subordinate Judge held that the surplus sale proceeds of Mouzah Chak were part of the mortgage security to which the Plaintiffs were entitled under their mortgage, and gave the Plaintiffs a decree. From that decree of the Subordinate Judge Ram Barhamdeo Prasad and Ram Sumran Prasad appealed to the High Court at Calcutta. In that appeal two learned Judges, *Henderson* and *Sale*,

JJ, held that the surplus sale proceeds of Mouzah Chak were portion of the security to which the Plaintiffs were entitled to look for satisfaction of their mortgage, and that they were entitled to follow that mortgage security in the hands of Barhamdeo Parsad and Sumran Prasad. Mr. Justice *Henderson* also suggested that Barhamdeo Prasad and Sumran Prasad, having obtained possession of the surplus proceeds which had been deposited in Court with the knowledge that they were subject to the claim of the Plaintiffs in priority to their own claim, and that they had abstained from giving notice of that suit to the plaintiffs, might be taken to hold the surplus proceeds under an implied trust for the plaintiffs. The High Court, holding that the suit was a suit to enforce a claim for money charged upon immoveable property and had been brought within time, dismissed the Appeal. From that decree of the High Court this Appeal has been brought.

Before this Board it was contended on behalf of the Appellants that this suit, so far as it related to the Appellants, was not a suit to enforce payment of money charged upon immoveable property, and that it was a suit to which Article 120 of the Second Schedule of the Indian Limitation Act, 1877, applied, and consequently that the suit was not brought within time. It was also contended by one of the Counsel of the Appellants that as the Rs. 12,197–8–3, surplus assets, had been received by Barhamdeo Prasad and Ram Sumran Prasad, who were not entitled to receive such surplus assets, the case came within Section 295 of the Code of Civil Procedure, 1882, and the remedy of the plaintiffs by a suit under that section was barred by time. As to the last-mentioned contention, it is sufficient to say that the facts of this case show that Section 295 of the Code of Civil Procedure, 1882, does not apply.

If Mouzah Chak had not been sold under the decree for sale of the 8th October 1890 it could not be suggested that the plaintiffs could not by suit, subject to the rights of the prior mortgagees, have enforced payment of the money charged upon that Mouzah by their mortgage of the 19th September 1887. Mouzah Chak was sold under the decree for sale of the 8th October 1890, which Ram Barhamdeo Prasad and Ram Sumran Prasad had obtained on their prior mortgage, and the surplus moneys of that sale represented the security which the plaintifts had under their mortgage of the 19th September 1887, and did not cease to represent that security owing to the fact that Ram Barhamdeo Prasad and Ram Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the Court in which they had been deposited. Their Lord-

Barhamdeo Prasad v. Tara Chand

ships do not think that it is necessary to decide the point referred to in the Judgment of Mr. Justice *Henderson*, viz., that under the circumstances of this case the money in the hands of the Appellants was saddled with a charge in favour of the plaintiffs to the amount of their charge, but they do not wish to be understood to express dissent from that view. For the decision of this case, it suffices to say that in their Lordships' opinion that is a suit to enforce payment of money charged upon immoveable property within the meaning of Article 132 of the Second Schedule of the Indian Limitation Act, 1877, and having been brought within twelve years from the time when the money sued for became due is within time. The Appeal fails.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed. The Appellants must pay the costs of the Appeal.

Solicitors for Appellants:—*T. L. Wilson and Co.*

Solicitors for Respondents:—*Theodore Belt and Co.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the High Court at Calcutta].

Present:—Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Parbati Dasi — *Appellant*

v.

Raja Baikuntha Nath De and others — *Respondents*

Parbati Dasi v. Baikuntha Nath De

Hindu Law—Dayabhaga School—Joint family—Self-acquired property—Source of payment of purchase money—Procedure—Concurrent findings presumption.

Where properties stood in the name of a junior member of a Hindu family governed by the Dayabhaga Law, the other members of the family being his father and brothers, and the question was whether those properties were his own or were acquired in his name by the father.

Held: that in the absence of evidence that he had any separate funds or that the properties were acquired with money belonging to himself, the presumption was that they were acquired by the father in his name and were not his self-acquisition.

Held further: that the question whether the properties were self-acquisition or not was a question of fact and the courts below having concurrently found against the plaintiff their Lordships could not go behind the finding.

Appeal from a Judgment and Decree of the High Court, dated July 27, 1906 affirming a Judgment and Decree of the Subordinate Judge of Cuttack dated May 28, 1903.

Parbati Dasi v. Baikuntha Nath De

Ragunath De was a successful trader and carried on an extensive business as a common carrier, having owned several vessels in which he conveyed country produce to Calcutta and Madras. He had three son's Rup Charan De, Sonaton De and Shyamanand De. They all lived as members of the same household, joint in food and worship. There were certain properties which stood in the name of Rup Charan De. The points of contention were (1) Whether Rup died before Ragunath (2) whether the property which stood in his name was his or his father's. Rup's daughter Parbati Dasi claimed that her father died after the decease of her grandfather and therefore she was entitled to ⅓ of the estate as heir of her father, while the property standing in the name of her father, was his and therefore hers. The contrary was asserted by the opposite parties. Both the Courts in India held that the appellant, Parbati Dasi, had entirely failed to establish that the property was acquired by Rup and that Rup died before Ragunath.

Parbati Dasi appealed to His Majesty in Council.

Ross K. C. with him A. Majid contended that in the circumstances of the case, the High Court was wrong in holding that it was for the appellant to prove that the property, alleged by her to be self-acquired property of her father, Rup Charan, was not joint family property. It misunderstood certain material documents and omitted to notice certain others equally material and important to prove appellant's case. [As there were concurrent findings on the points stated above their Lordships did not wish to hear the case further.]

De Gruyther K. C. and *Dunne* for the Respondents were not called upon to reply.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali:—This is an Appeal from a Judgment and Decree of the High Court of Bengal, dated the 27th of July 1906, which affirmed a Decree of the Subordinate Judge of Cuttack, in the Province of Orissa, dismissing the Plaintiff's suit.

The parties are Hindus governed by the Dayabhaga law, and are descended from one Raghunath De. Raghunath had three sons, Rup Charan, Sonatan and Shyamanand, who admittedly formed a joint Hindu family. The Plaintiff is the daughter of Rup Charan, and she brought this suit in the Court of the Subordinate Judge for a declaration that certain properties included in Schedule Ka attached to the plaint were the self-acquired properties of her father which devolved upon her after the death of her mother, Annapurna, and for the usual consequential relief in respect thereof. She also alleg-

Parbati Dasi v. Baikuntha Nath De

ed that Rup Charan survived his father, and that she is entitled to the one-third share on Raghunath's death.

The Defendants, on the other hand, alleged that Rup Charan predeceased his father and that the Ka properties were acquired by Raghunath in the name of Rup Charan, and were not the self-acquired properties of Rup Charan.

Both the Courts in India have concurrently found against the Plaintiff the facts on which she bases her claim. They have held that she has failed to prove that the Ka properties were acquired by her father out of his own funds and that it had been established that Raghunath survived Rup Charan. They have accordingly dismissed the Plaintiff's suit.

As it is not their Lordships' rule to interfere in cases in which there are concurrent findings of fact, it has been argued by Mr. Ross, on behalf of the Plaintiff, that the Courts below erred in not drawing proper conclusions from the documentary evidence of the Plaintiff. In other words, he contended that as the conveyances stood in Rup Charan's name the Courts ought to have presumed that the Ka properties were his self-acquired properties until disproved by the Defendants.

The principle applicable to this class of cases where there is a dispute whether a property standing in the name of a junior member of a Hindu family was his self-acquisition was enunciated so long ago as 1843 in *Dhurm Das Pandey* v. *Mussumat Shamo Soondri Debiah*[1], where Lord Campbell said:—"The criterion in these cases in India is "to consider from what source the money comes with which the purchase money is paid." This principle was reaffirmed in 1854 in *Gossain* v. *Gossain*[2].

In the present case both the Courts below have found that there was no evidence that Rup Charan had any separate funds or that the properties in dispute were purchased with money belonging to him. In the absence of such evidence the presumption is clear and decisive that they were acquired by the father in the name of the son, and that they were not the self-acquired properties of Rup Charan.

On the whole their Lordships are of opinion that this Appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Solicitors for Appellants:—*E. Dalgado.*

Solicitors for Respondent:—*Downer and Johnsor.*

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1. (1843) 3 M. I. A. 229   2. (1854) 6 M. I. A. 53

P. R. RAMA IYAR & CO., PRINTERS, MADRAS.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court at Calcutta.]

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Arun Chandra Singh and another — *Appellants* *

v.

Kamini Kumar and others — *Respondents.*

Arun Chandra Singh v. Kamini Kumar.

Landlord and Tenant—Diluvion—Submergence and reformation in situ—Bengal Act VIII of 1869, S. 19—Abatement of rent—Effect of—Until abandonment, right to submerged lands remains—Remission of rent, not evidence of—Regulation (Bengal) XI of 1825, S. 4.

Where lands forming part of a *patni* became submerged by river action but subsequently reappeared and reformed *in situ*.

Held: That until it is established that the holder of the tenure has abandoned his right to the submerged lands, it remains in tact.

The fact that he has claimed or accepted remission of rent in respect of those lands is not proof of such abandonment.

Nashar Rai v. *Ramgat Singh* (1) approved and followed.

Hemnath Dutt v. *Askghar Sindar* (2) overruled.

Appeal from a Judgment and Decree of the High Court dated June 29, 1909 reversing a Judgment and Decree of the District Judge of Noakhali, dated December 6, 1906.

In 1837 a patni comprised of two taluqs, Algi and Paniar Tek, situated on a river, was created. The Kabuliat contained the stipulation that the patnidar would pay more or less rent according as the lands in the taluqs were more or less than what were granted as patni. In 1843 the cultivable area having been increased by alluvial recession of the river, the zemindars obtained by suit a proportionate enhancement of rent. Subsequently diluvion took place, and the patnidars obtained decrees for proportionate abatement of the rent. The river once more began to recede and thus land was gradually reformed on the original site. This land was the subject of dispute. The zemindars claimed it as their Khas property while the patnidars claimed the same as their's having been reformed on the site of the lands subject to the patni tenure. The zemindars brought a suit in ejectment

(1). (1896) I. L. R. 18 All. 290. (2). (1879) I. L. R. 4 Cal. 894.

* 10th December 1913.

Arun Chandra Singh v. Kamini Kumar.

against the patnidars. The District Judge decided in favour of the zemindars. On appeal this Judgment was reversed on the ground that by the terms of the kabuliat, the zemindars were bound to recoginse the right of the patnidars to the lands in question—an arrangement on which both parties had already acted. Against this judgment of the High Court, the zamindars appealed to His Majesty in Council.

De Gruyther, *K.C.* (with him *Dunne*,) on behalf of the appellants contended that the terms and provisions of the patni lease had no application to the circumstances of the case, nor to the questions arising thereon. The char in dispute formed on its appearance part of the khas lands of the zemindari and the title thereto was in the zamindar and not in the patnidar. Lands washed away and reformed on the site of the former lands were not increments. It was clearly laid down by the authorities on the English Law. It was also held by the High Court at Calcutta that a tenant lost his right to reformed land by the non-payment of rent during the time the land was submerged.

Reference was made to Act 8 of 1869 (Bengal Code) S. 19. *Felix Lopez* v. *Madan Mohan Thakur* (1) *Hemnath* v. *Asghar Sirdar*(2) *Saligram Singh* v. *Palak Pandey*(3) *Nazhar Rai* v. *Ramgat Singh*(4).

Kenworthy Brown appeared for the respondents and was not called on to reply.

The Judgment of *their Lordships* was delivered by

Mr. Ameer Ali:—The sole question involved in this Appeal, which is from a Judgment and Decree of the High Court of Bengal, relates to the title to certain lands that had been washed away some years ago by the river Siddhi in the Noakhali district and have since reformed in consequence of a change in the course of the stream.

The Plaintiffs, Appellants, are the owners of a *zamindari* called Pergunnah Bhulua, situated in that district. Within this *zamindari* lies a *Patni* tenure called *Talu Ram Saran Pal*, created so long ago as 1837 by one of the predecessors in title of

(1) (1870) 13 M. I. A. 467. (2) (1879) I. L. R. 4 Cal. 894.
(3) (1907) 6 Cal. L. J. 149. (4) (1896) I. L. R. 18 All. 290.

Arun Chandra Singh v. Kamini Kumar.

the present zamindars. The Taluk is now owned by the first and second Defendants, Respondents in this Appeal. The remaining numerous Defendants are ryots placed on the land, by the Patnidars, since its reformation.

The *Dowl Kabuliat* executed by the Patnidar in respect of the tenure shows that it comprises parts of two *Kismats* or subdivisions of villages named respectively *Kismat Paniartek* and *Kismat Algi*; and the area included in the Taluk was evidently given approximately, for the lease contains the following covenant—

> "If the land be found to be more on measurement by Nal prevalent according "to the custom of the pergunnah, I shall separately pay the rent thereof "at this rate; if it be found to be less, I shall get remission therefor."

Their Lordships have little doubt that the reason for the approximate statement of the area and the particular provision regarding the variation of the rent in certain probable contingencies was due to the fact, which has not been seriously controverted, that a strong tidal river flowed close to the boundaries of the Taluk in question.

It is in evidence that in 1843 the Plaintiffs obtained a decree in the Revenue Courts for increased rent on the ground that additional land was found upon measurement to be in the Patnidar's possession.

Later, considerable parts of the Algi lands having been washed away by the action of the river, the Defendants obtained, under the provisions of S. 19 of the Bengal Council Act VIII. of 1869, a proportionate remission of rent. The last proceeding in this respect was in 1889.

Since then the diluviated lands have re-appeared and admittedly reformed *in situ*. With their re-appearance disputes arose between the parties; the Plaintiffs claimed that the lands in question formed part of their *zamindari*, whilst the Defendants contended that they were accretions to the Taluk. Each party attempted to exercise rights of ownership in order to create evidence of adverse possession against the other side. Their Lordships agree with the High Court that the evidence on this point is wholly inconclusive.

Arun Chandra Singh v. Kamini Kumar.

The suit was brought by the Plaintiffs, the Zamindars, in June 1906 to obtain *Khas* or direct and exclusive possession of the lands in question by a declaration of their title, the usual form of relief asked for in the Indian Courts in these cases. In the alternative they urged that if their claim to *Khas* possession failed, it might be declared that the Defendants were entitled to hold the land subject to the payment of proper rent for the same. The Defendants, besides pleading that the lands in suit were accretions to their Taluk, urged that the Zamindars were only entitled to rent, but not to *Khas* possession.

The District Judge made a decree in the Plaintiffs' favour, substantially on the ground that as the Defendants had obtained abatement of rent in respect of the lands that had been washed away by the river, they had lost all title to the reformed lands. On appeal the High Court has taken a different view. It has held in substance that having regard to the terms of the contract and the conduct of the parties, the Plaintiffs had no right to eject the Defendants from lands which originally formed part of Kismat Algi and had been washed away by the river. They accordingly dismissed the Plaintiffs' suit. In their Lordships' opinion the learned Judges are right in holding that the lands do not come within the provisions of S. 4 of Regulation XI of 1825, and cannot be claimed by either party as accretions to their respective property. The learned Judges of the High Court appear, however, to have laid too much stress on the terms of the *Kabuliat* and the evidence of intention deducible from the various proceedings in respect of additional rent and abatement of rent. They evidently felt pressed by an older ruling of the Calcutta High Court in *Hemnath Dutt* v. *Askghar Sindar* (1) Their Lordships, however, do not find themselves in accord with the rule of law expressed in that case. They think that the principle applicable to this class of cases is correctly enunciated in *Nazar Rai* v. *Ramgat Singh* (2)

In the present case there is nothing to show that, by claiming or accepting remission of rent in respect of lands washed away from time to time by the action of the river, the Defend-

(1) (1879) I.L.R. 4 C. 894 (2) (1896) I.L.R. 18 All. 290.

ants abandoned, or agreed to abandon, their rights to such lands on their reformation *in situ*, as is admittedly the case here. The diluviated lands formed part of a permanent, heritable, and transferable tenure; until it can be established that the holder of the tenure has abandoned his right to the submerged lands it remains intact.

Arun Chandra Singh v. Kamini Kumar.

In the result their Lordships are of opinion that this Appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

This decree, however, will be no bar to any proceeding on the part of the Plaintiffs authorised by law to recover proper rent in respect of the reformed lands.

Solicitors for appellants:—*Morgan, Price and Co.*

Solicitors for respondents:—*T. L. Wilson and Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.†

Present:—Mr. Justice Sankaran Nair, and Mr. Justice Ayling.

Epoor Ramasami Reddi, and others — *Appellants** (*Petitioners Judgment debtors*).

v.

Kandadai Rangamannar Iyyengar — *Respondent.* (*Respondent, Decree-holder*).

Ramasami Reddi, v. Rangamannar Iyengar.

Mortage decree—C. P. C. order 34 r. 5—order absolute—Execution ordered without—Res judicata in execution proceeding—order for execution made after notice—Binding in subsequent stages.

The fact that an order absolute is not made before execution is taken of a mortgage decree is not an objection available to the judgment debtor when an order for execution has already been made after notice to him and the same has not been set aside.

Appeal from the order of the District Court of Nellore, dated the 13th March 1913, in C. M. P. No. 337 of 1912 (in E. P. No. 113 of 1911 in O. S. No. 37 of 1908.)

K. Srinivas Aiyangar, V. *Visvanatha Sastri* & *A. Krishnasami Aiyar* for Appellants.

*A. A. O. No. 148 of 1913 †3rd February 1914.

Ramasami Reddi, v. Rangamannar Iyengar.

S. T. Srinivasagopala Chariar and *C. V. Ananthakrishna Aiyar* for Respondent.

The Court delivered the following

Judgment :—We think the District Judge is right in holding that the 1st appellant has failed to prove the agreement set up by him. His case is that in December 1911 the decree-holder came to his village to see the properties and in January 1912 he offered the lands at Rs. 250/- per acre of wet-land and Rs. 80 per acre of dry-land. He swore that the decree-holder told him that he proposed to sell some of these lands after his purchase to Subba Reddi and Ranga Reddi and Exhibit A according to him is a letter with reference to this conversation. In our opinion Exhibit A not only does not support but is against his contention. It shows further that the decree-holder did not want to purchase the lands. If he wanted to get the lands himself he would undoubtedly have taken steps to enforce the decree soon after the amount became payable to him. We are not satisfied that the letter Exhibit B was written in accordance with instructions given by the respondent. The affidavit Exhibit K also is not in support of the Petitioner's case. In these circumstances we are not prepared to believe the witness whom the Judge has disbelieved and we confirm his finding on this point.

The next question is whether the respondent is entitled to execute the decree at all. It is contended that it is only a preliminary decree and that according to the decision of the Privy Council, in *Ashfag Hussain* v. *Gauri Sahai* (1) which has been followed by Miller and Sadasiva Aiyar JJ., in C. M. S. A. No. 86 of 1910, Benson and Sundara Aiyar JJ., in C. M. A. No. 269 of 1911, a preliminary decree is not capable of execution and it is only the decree absolute under R. 5, O. 34 that can be executed. In this case it is clear that no decree absolute under R. 5 had been passed, but we think it is unnecessary to decide this question, because this contention is not available to the appellants. On the decree-holder's application for the execution of the decree notice was issued to

(1) (1912) I. L. R. 33 A. 264

the judgment-debtors (appellants) and an order was passed directing the sale of the property; no objection was taken to the sale on this ground. It has been repeatedly held that even though a relief may not have been granted by the decree yet if in execution proceedings a Court holds that a party is entitled to such relief under the decree it is not open to the parties afterwards to contend that no such relief has been awarded and the matter is *res judicata*. We are therefore of opinion that in this case it is not open to the appellants to plead that there is no decree under which the properties could be sold. We must therefore disallow this contention and we dismiss the appeal with costs.

Ramasami Reddi, v. Rangamannar Iyengar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar.

Amirtham Pillai — *Petitioner** (*2nd Defendant.*)

v.

Nanjah Gownden and another — *Respondents* (*Plaintiff and 1st Defendant.*)

Promissory note—Intention that two should jointly execute—Failure of one to—Not enforceable against the other—Forgery of signature of a joint executant—Material alteration—Effect of.

Amirtham Pillai, v. Nanjah Gownden.

Where it was intended that two persons should jointly execute a promissory note and should become jointly liable and one of them does not execute, the note is not enforceable as against the other.

Where a note purports to be executed by two persons and it is found that the signature of one of them is a forgery, the whole note is bad and enforceable against neither.

Petition under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of the Nilgiris, Ootacamund, in small cause suit No. 674 of 1912.

T. R. Venkatarama Sastri for petitioner.

The Court delivered the following

Judgment:—If, as is implied in the plaint, the two defendants were intended to be jointly liable for the plaint debt and were together to execute the promissory note Ex. A, for that debt so as to make themselves jointly liable, and if the 1st defendant

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* C. R. P. 129 of 1913 — 5th, February 1914.

Amirtham Pillai, v. Nanjah Gownden.

did not join in the execution (as found by the Subordinate Judge) and only the 2nd defendant signed in it, even the 2nd defendant could not be made liable as he agreed to be liable only if the 1st defendant was also jointly made liable (see *Sivasami Chetti* v. *Sevugan Chetti* (1).

Further a material portion of the promissory note being a forgery, it seems to come within the principle of the decisions which hold that a material alteration invalidates the whole note. I find that that principle has been so applied to a case where there seems to have been no alteration after the note came into existence but the note was created in the first instance itself with a forged signature of a material character. (See C. R. P. No. 601 of 1912 per *Miller J.*)

I, therefore accept this petition and modify the Lower Court's Judgment by dismissing the suit against the 2nd defendant also. The 2nd defendant will bear his own costs in both Courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar.

Bila Sanyasi Naidu — *Petitioner (Defendant)*.*

v.

Agnihotram Venkatacharyulu, and others — *Respondents (Plaintiffs).*

Sanyasi Naidu v. Venkatacharyulu.

Madras Estates land Act S. 8—Permanent Settlement—Inam granted before—Not "estate."

An inam granted before the Permanent Settlement and which did not form part of the assets of the zamindari, is not an estate within the meaning of S. 8 of the Estates Land Act.

Veerabadrayya v. *Sonti Venkanna* (2) followed.

Petition under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Vizagapatam in Appeal Suit No, 174 of 1911, preferred against the decree of the Court of the District Munsif of Chodavaram in O. S. No. 505 of 1909.

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* C. R. P. No. 662 of 1912 — 6th February, 1914.

(1) (1902) I.L.R. 25 M. 389. (2) (1913) 24 M. L. J. 659.

Sanyasi Naidu v. Venkatacharyulu.

Mr. S. Srinivasa Aiyangar for petitioner.

The Hon'. Mr. B. N. Sarma for defendent.

The Court delivered the following

Judgment :—This is a petition under S. 115 of C. P. C. to revise the decree of the District Judge of Vizagapatam in A.S. No. 174 of 1911. The suit out of which that appeal arose was brought by some inamdars against their tenant to recover rent due for the first two instalments of the year *soumya*. The plaintiffs' suit was decreed on certain findings of fact and of law. There are nine grounds in the Memorandum of Civil Revision Petition presented to this Court. The phrase " The Court below acted illegally and with material irregularity " occurs in several of these grounds but I am satisfied that it only means that the Court committed some error of law or other in arriving at certain findings of fact or of law. S. 115 therefore has no application and the contentions raised in these grounds must be rejected. The only contention which really relates to the question of jurisdiction is that raised in the 6th ground of the memorandum, namely, " that a suit for rent of this land ought to have been preferred before the Revenue Court," though the reason why the jurisdiction of the ordinary Civil Courts is ousted is not expressly mentioned even in this ground.

It is argued that the inam falls under the definition of an " estate " within section 3 of the Estates Land Act, that therefore the plaintiffs are " land-holders " and that the suit for rent against a tenant holding under a land-holder ought to be brought in the Revenue Courts and not in the Civil Courts. It appears in this case that the inam had been granted by a former Maharajah before the issue of the Permanent Settlement sannad to the Maharajah of Vizianagaram, and following *Virabhadrayya* v. *Sonti Venkanna* (1) I must hold that the inam is not an " estate " or part of an estate nor are the inamdars "landholders within the definitions of those termscontained in the Estates Land Act. The Jurisdiction of the Civil Courts has, therefore, not been lost over a suit for rent by such an Inamdar.

I dismiss the petition with costs.

(1) (1913) 24 M. L. J. 659.

IN THE HIGH OURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Budansa Rowther and another. } *Appellants* *(*Plaintiffs*).

v,

Fatma Bi and others.—*Respondents* (*Defendants*).

Budansa Rowther *v.* Fatma Bi

Spencer J.

Hindu Law—Married woman—Conversion to Mussalman faith—Marrying a Mahomedan during the life time of her Hindu husband—Legality—Offspring of such second union—Legitimacy—Right to shares—Mahomedan law—Paternity—Acknowledgment.

A Hindu married woman became a convert to Mahomedanism and during the lifetime of her Hindu husband married a Mahomedan and had several children. *Held* that the second marriage was illegal and the children who were born of this union were illegitimate.

Under the Hindu Law apostacy or conversion does not dissolve the marriage tie.

Per Spencer J (Sadasiva Aiyar J concurring).—Under Mahomedan Law the marriage of a man with the wife of another man is not permitted so long as the first marriage is subsisting. Such a union will not merely be invalid but void and illegal.

The Mahomedan and Hindu Laws being personal, attached to the followers of each religion wherever they may be living. (Here the first marriage was in French territory in India and the second in British India.)

A mere recognition of paternity is not equivalent to a recognition of legitimacy and that acknowledgement cannot make the offspring of zina (adultery) legitimate.

In the matter of Ram Kumari (1) *Emperor* v. *Lazar* (2) *Sundari* v. *Pitambur* (3) *The Government of Bombay* v. *Ganga* (4) *Jamna Devi* v. *Mul Raj* (5) foll.

Where a conflict occurs between persons belonging to different religions, the courts must apply the rules of Justice Equity and Good conscience. 28 M 171 ref.

In testing whether the 1st marriage of a Hindu woman with a man of her own class was subsisting or not at the time of her 2nd marriage with a Mahomedan after she became a convert to Mahomedanism, the principles of Hindu Law must be applied. But in testing the validity of her second marriage the principles of Mahomedan Law should be applied.

If there is a custom among any community of allowing a woman to marry again during the life time of her first husband without any defined rules by which the

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* S. A. 752 of 1912. 12th November 1913.

(1) (1891) I.L.R. 18 C. 264.

(2) (1906) I.L.R. 30 M. 550.

(3) (1905) I.L.R. 32 C. 871.

(4) (1880) I.L.R. 4 B. 330.

(5) 42 P. R. Judl. Part I, 198.

marriage with her first husband is dissolved before the second marriage is contracted, such a custom is contrary to public policy and morality and cannot be recognised by courts.

Per Sadasiva Aiyar J:—The doctrine of *factum valet* can never excuse the violation of a legal rule. India is not a non-Islamic country.

Second appeal from the decree of the District Court of South Arcot in A. S. No. 26 of 1911, preferred against the decree of the Court of the District Munsif of Panruti at Cuddalore in O. S. No. 82 of 09.

L. A. Govindaraghava Aiyar and M. Naryanaswami Aiyar for appellants.

T. Rangachariar and G. S. Ramachandra Aiyar for respondents.

Spencer J:—The plaintiff, who died during the pendency of the suit, was one of the daughters of Jaila Rowther by his first wife Fatma Bi, and the 7th defendant who was the principal of those who contested the claim is a daughter by a later marriage. The suit was brought for the recovery of the plaintiff's share of her father Jaila Rowther's share in the estate of the plaintiff's grandfather, Ahamsa. It was resisted on the ground that the plaintiff's mother having been married to a Hindu husband, named Maniya Gounder, her subsequent marriage to Jaila Rowther, while the first marriage was subsisting, was not legal, and, therefore, the plaintiff and the defendants Nos.2, 4 and 5 were illegitimate and as such debarred by the form of Mahomedan law in force among Sunnis from inheriting as sharers. The suit failed in both the Lower Courts. and the plaintiff's legal representatives appeal by their next friend.

Five contentions based on questions of law have been put forward at the hearing of this second appeal, namely:

(1) By conversion to Islam the 1st Defendant became a good Mahomedan and the tie of her marriage with a Hindu became thereby dissolved and her subsequent marriage to a Mahomedan was valid.

(2) a marriage of this kind, though irregular, would be regarded by the Mahomedans as not invalid, and by the principle

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of *factum valet* the irregularity would be condoned by the couple living together as husband and wife ;

(3) in considering whether the marriage is valid, it is necessary to apply the law prevailing in the French possessions in India. Hindus and Mahomedans living in French India are not necessarily governed by the Law recognised in British India, and it is incumbent on the defendants to show that the French Courts have adopted the same principles as the courts in British India.

(4) by the custom and usages of persons belonging to the Palli caste, Marriage with a second husband during the life time of the first husband is permissible; and the onus lies on them, who assert that such a custom is not applicable in a particular case to prove it ; and

(5) the finding of fact by the Lower Courts amount to the establishment of the fact that there was an acknowledgment on the part of Jaila Rowther of the legitimacy of his children by the first defendant. It is conceded that if the Marriage was invalid and the parties knew it, no acknowledgment could make legitimate the offspring of a union which has its inception in illegitimacy, but it is contended that it has not been proved that the parties to the marriage knew it to be an invalid one.

We may briefly dispose of the last of these contentions by observing first that the Mahomedan and Hindu laws being personal laws are attached to the followers of each religion where-ever they may be living, and that the facts found by the lower Courts are that the plaintiff's mother, Fatima *alias* Unnamalai was Married to Maniya Gounden at Kariam Puthur in Pondicherry, but her marriage to Jaila Rowther was performed at Sholavalli in the South Arcot District which is Brritish territory, and therefore as the marriage to Jaila Rowther has come before the British Courts, the law we must administer is that prevailing in British India ; Secondly, that, assuming that there is a custom among Pallis or Vanniyans of allowing a woman to marry again during the life time of her first husband, such a custom is contrary to

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public policy and to morality and appears to be condemned by the community (see p. 103, Gazetteer of the South Arcot District), and, therefore, the courts will refuse to recognise it; and thirdly that a mere recognition of paternity is not equivalent to a recognition of legitimacy (vide *Abdul Razak* v. *Aga Mahammed Jajar Bindami*(1) and that acknowledgment cannot make legitimate the offspring of Zina (Fornication or adultery) (vide *Mardan Saheb* v. *Rajak Saheb* (2).

The question of law arising out of the first two contentions, which may be taken together, are more difficult of solution, but we feel no doubt of the answer which must be given to them.

The District Munsif found that the first defendant's Hindu marriage with Mania Goundan took place forty years ago. In paragraph 38 of his judgment he stated that her marriage with Jaila Rowther might be presumed to have taken place more than thirty four years ago, though in the last paragraph of his judgment he gave no definite finding as to the date of this marriage, and the District Judge has left it open. Assuming that the 1st Defendant's conversion and marriage took place before the conception of the children who were born of this union, the point to be decided is whether they may be treated as legitimate offspring. In a Mahomedan country the law is, that, when a woman is converted to the faith of Islam, she must apply to the *Kazi* or magistrate, who will call upon the husband to embrace the faith also, and, if he refuses, the Kazi will dissolve the marriage. In a foreign country, if the wife becomes a moslem and her husband is an infidel, separation takes place after the lapse of three monthly courses (see pages 176 to 179 of Hedaya Vol. I, and pages 426 and 427 of Amir Ali's Mahomedan Law Vol. II). Certain observations which occur at p. 12 of Norton's Leading cases Vol. 1 and the remarks of Mr. Justice Kernan in *Sinammal* v. *The Administrator General of Madras*,(1) are quoted in support of the theory that, when a Hindu married woman who deserts her husband becomes a convert to Mahomedanism and adopts the habits of, and lives as the wife of, a Mahomedan,

(1) (1894) I. L. R. 21. C. 666.) (2) (1909) I. L. R. 34 B. 111.)

(1) (1888) I. L. R. 8 M. 169.

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she is altogether out of the pale of the Hindu law and ceases to have any recognised legal status she has according to that law, that she becomes civilly dead and that the marriage and the relation of husband and wife become thereby absolutely dissolved. The view taken by Mr. Justice Kernan was not completely followed by Mr. Justice Parker when the question of the same marriage between *Sinammal and Krishna* a native convert to christianity came up for his consideration. He pointed out that, although Krishnan's conversion to christianity rendered him an out-caste, according to the Hindu Law he might have been re-admitted to the status as a Brahmin and his degradation might have been atoned for by renouncing Christianity and performing the rights of expiation enjoined by his caste. He therefore held that apostacy does not itself dissolve the marriage tie. (*Administrator General of Madras* v. *Anandachari*. (1)

This question has now been settled beyond all reasonable doubt by the decisions in *In the matter* of *Ram Kumari* (2) which was followed in *Emperor* v. *Lazar* (3) also by *Sundari Letain* v. *Pitambari Letain* (4) by the *Government of Bombay* v. *Ganga* (5) and by *Jamna Devi* v. *Mul Raj*. (6) where the questions arising for determination were similar to those in the present suit.

Where a conflict occurs between persons belonging to different religions, the courts must apply the rules of Justice, Equity and Good conscience. Vide *Subbaraya Pillai* v. *Ramasami Pillai* (7).

In considering whether the 1st defendant's first marriage was subsisting or not at the time of her second marriage with Jaila Rowther, the principles of Hindu Law must be applied; but in testing the validity of her second marriage with Jaila Rowther the principles of Mahomedan Law must be applied. According to Hindu Law, her Hindu marriage was not dissolved by her apostacy. According to Mahomedan Law, the marriage of a man with the wife of another man is not permitted so long as the first marriage is subsisting. Such a union will not be

(1) (1886) I. L. R. 9 M. 460.
(2) (1891) I. L. R. 18 C. 264.
(3) (1906) I. L. R. 30 M. 550.
(4) (1905) I. L. R. 32 C. 871.
(5) (1880) I. L. R. 4 B. 330.
(6) 42 P. R. Judl. Part I 198.
(7) (1899) I. L. R. 23 M. 171.

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merely invalid (*fasid*) but altogether void (*batil*) and illegal. (Vide *Liaqat Ali* v. *Karim-an-nissa* (1) and page 332 cl. (c.) of Amir Ali's Mahomedan Law Vol. II). The *dictum* in I Norton's Leading cases page. 12 must be considered to have been over-ruled by subsequent decisions and to be no longer good law.

It is argued that, because the conversion of a non-moslem wife to Mahomedanism in a foreign country dissolves the wife's marriage with her non-moslem husband after the completion of three of her periods, the marriage in the present case would be perfectly valid, supposing that the moslem husband waited for three months after the woman's conversion before he married her; and that even if the marriage had been performed during those three months, the marriage would be merely irregular (see Mr. Justice Tyabji's Principles of Mahomedan Law pages 102 and 103 for the principle that a marriage during the *iddat* or three moths' period which must elapse between the termination of one marriage and that into which a woman may subsequently enter, is only irregular). As it must be held on the authority of the decisions to which I have referred that the 1st defendant's marriage with her Hindu husband was still subsisting in spite of her conversion her marriage to another man of a different religion was not merely irregular in the eye of Mahomedan Law, but absolutely illegal and prohibited. The plaintiff must then be regarded as an illegitimate child of Jaila Rowther, even adopting the facts most favorable to her contention. The second appeal fails and is dismissed with costs of the 6th, 7th, 9th, 11th and 12th respondents (one set).

Sadasiva Aiyar :—I entirely agree with the judgment just now pronounced by my learned brother, and I do not think that I can usefully add anything in my own words. I might, however, emphatically endorse his view that, if there is a custom among any community of allowing a woman to marry again during the lifetime of her first husband without any defined rules by which the marriage with her first husband is dissolved before the second marriage is contracted such a custom is contrary to public policy and morality, and cannot be recognized by the

(1) (1893) I. L. R. 15 A. 396; and p. 322.

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courts. The sentence quoted, however, by the learned Vakil for the appellants from the South Arcot District Gazetteer (page 103) does not, in my opinion, speak to the existence of the large ill-defined custom relied upon by the appellants. As regards the doctrine of *Factum valet*, neither in the Hindu nor the Mahomedan law, does it ever excuse the violation of a legal rule so as to make acts performed in such violation legally valid. That doctrine only means that a precept which merely belongs to the domain of ecclesiastical admonitary precept has not "in the domain of Vyavahara" or secular law the same force as a positive and clear rule of the Vyavahara law has. As Sirkar says, in his book on Hindu Law III Edn. pages 16 and 17 the texts of Vyasa which prohibit one to alienate one's own share in a joint family property or one's own self acquired property are moral precepts and cannot weigh against the man's legal rights to exercise the right of alienation which the positive Civil Law gives, as "it is an axiomatic principle of the Vyavahara Law that a co-sharer can dispose of his share and that one can dispose of his self acquired property."

On the question of conversion to Islam of a Hindu wife and her marriage thereafter to a Mussalman husband during the life-time of her first husband I shall merely quote a few passages from Ameer Ali's Mahomedan Law, Vol. II. "The Native converts, Marriage Dissolution Act (XXI of 1866) was specially designed to meet the case of converts to christianity from Hinduism and other cognate systems which do not recognise the dissolution of a marriage once contracted.
"Christianity and Islam are the only two proselytising religions in India, and conversions to Islam are frequently as sincere as conversions to Christianity." But no "native husband" or "native wife" adopting Islam is entitled to come to the court to obtain the relief provided in the Act. Their status is *not allowed to be governed by the laws of the new Faith, but continues to be subject to the law and custom to which they were subject before.*" See page 425.

"If the conversion to Islam takes place in an Islamic country, the Kazi must be moved to summon the other party to adopt the

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moslem faith. In case of compliance, the marriage remains in tact and valid *ab initio*, and there is no need for renewing the contract, though in practice it is sometimes done. ***Until the Judge has made his decree separating the parties, the connection remains invalid and has all the consequence following from an invalid connection.***" See pages. 426 & 427.

"The Calcutta High Court has held that India is not a non-Islamic country, and that consequently when a married non-Moslem woman adopts the mahomedan faith, and, thereafter, contracts a fresh marriage without applying to a Judge or a Magistrate to call upon the husband to adopt Islam she is guilty of bigamy." See page. 427.

In the result, I agree with my learned brother that this second appeal should be dismissed with costs of the respondents Nos. 6, 7, 9, 11, and 12.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair, and Mr. Justice Ayling.

Samandan Karkat Edathil Rayarappan Nambiar } *Appellant** (*Petitioner*).

Malikandi Aketh Mayan *Respondent*. (*Petitioner*).

Rayarappan Nambiar v. Malikandi Aketh Mayar

Execution—Mortgage decree—Death of judgment-debtor—Legal representatives not brought on record.—Sale—Mortgagee purchaser—Notice—setting aside—Limitation Act (IX of 1908). art. 166.

When in execution of a mortgage decree the mortgagee who had notice of the death of the judgment debtor without bringing on record the legal representatives brought the property to sale and purchased the same himself *held*, that the sale was a nullity against the representatives of the judgment—debtor.

Groves v. *Administrator-General* (1) *Krishnayya* v. *Unnissa Begam* (2) *Ramasami* v. *Bagirathi* (3) followed; *Mallikarjun* v. *Narhari* (4) distinguished.

30 days limitation does not apply when the sale sought to be set aside is a nulltiy and not merely irregular.

Appeal from the order of the District Court of North Malabar in C, M. P. No, 13 of 1912, preferred against the order of the Court of the District Munsif of Taliparamba in C. M. P. No. 432 of 1912.

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* A. A. A. O. No. 7 of 1913. 29th January 1914.

(1) (1891) I. L. R. 22 M. 119. (2) (1891) I. L. R. 15 M. 399.

(3) (1883) I. L. R. 6 M. 180. (4) (1900) I. L. R. 25 B. 337.

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K. Govinda Marar for Appellant.

V. *Ryru Nambiar* for Respondents.

The Court delivered the following

Judgment:—The plaintiff in O. S. No. 590 of 1903 obtained a decree on his hypothecation deed for the sale of the properties mortgaged against the mortgagor and the appellant's predecessor-in-title who was a puisne mortgagee. The puisne mortgagee purchased the mortgagor's interest in a Judicial sale in execution of a decree obtained by him to which the plaintiff was a party. The mortgagee-judgment-debtor in O. S. No. 590 of 1903 died and without bringing his representatives on record the plaintiff got the properties sold in execution of his decree. The appellant now applies in effect to be made a party and to set aside the sale on payment to the plaintiff of the amount due to him under the decree. He also alleged fraud. The Lower Courts hold that the application is barred by limitation. If the sale is a nullity so far as he is concerned, then the application is clearly not barred. According to the decisions of this Court, *Ramasami* v. *Bagirathi*[1] *Krishnayya* v. *Unnissa Begam*[2] and *Groves* v. *Administrator-General*[3] the omission to bring the representatives on record is not a mere irregularity. It renders the sale a nullity against the representatives of the judgment-debtor. But it is contended that these decisions have been overruled by the Privy Council, See *Malkarjun* v. *Narhari*. In that case however there was an order passed by the Court executing the decree directing a person to be brought on record as the representative of the deceased judgment debtor. The fact that the decision was afterwards found to be erroneous and the true representatives were not brought on record was held not to be sufficient to set aside the sale against a *bona fide* purchaser. See *Khiarajmal* v. *Daim* In this case it may also be pointed out that the decree holder was the purchaser and he had notice of the death of his judgment debtor. We are therefore unable to hold that the Madras Cases are no longer of any authority.

(1) (1888) I. L. R. 6 M. 180. (2) (1891) I. L. R. 15 M. 399.
(3) (1891) I. L. R. 22 Mad. 119. (4) (1900) I. L. R. 25 B. 337.
(5) (1904) I. L. R. 32 C. 296 at 315 (P. C.)

The appellant therefore will be placed on record as the representative of his Karnavan and on payment of the amount due to the decree holder, the sale will be set aside. The appellant is entitled to the costs in this and the Lower Appellate Court. The Costs in the first Court will be provided for in the final order.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, Kt. Chief Justice and Mr. Justice Tyabji.

Segu Rowthen and others *Appellants**

Muthu K.R.V. Alagappa Chetty and others ***Respondents*** in all cases. ***(Plaintiffs)*** in Do.

Segu Rowthen v. Alagappa Chetty.

Madras Estates Land Act S 4—Landlord prima facie entitled to rent on all ryoti land, whether cultivable or not—Rule displaced by agreement—practice before the act to charge only cultivated lands - Binding after—Right to collect rent and basis of calculation—Basis of calculation not to be altered.

Per Chief Justice :—*Prima facie*, the landlord is entitled to rent in respect of all ryoti land in the occupation of the tenant whether he has cultivated it or not but this general rule may be displaced by agreement between parties.

Per Tyabji J.—S 4 gives the right to the landholder to collect rent in respect of all the ryoti land in the occupation of the ryot but that section by itself does not suffice for the determination of the total amount of rent that has to be collected; and where the practice before the Estates Land Act was to charge only for lands cultivated by the tenant, to charge rent for all the lands whether cultivated or not would amount to an enhancement and be opposed to Chapter III of the Act.

Right to collect rent and basis of the calculation of rent distinguished.

Second Appeals from the Decrees of the District Court of Ramnad in A. S. Nos. 502, 536, 504, 506, 505, 524, 538, 546, 547, 528, 542, 548 and 526 of 1910, respectively presented against the Decree of the Court of the Special Deputy Collector of Ramnad, in Summary Suits Nos. 400, 748, 408, 415, 412, 704, 842, 843, 717, 785, 844, and 710 of 1910.

V. Visvanatha Sastriar for Appellant.

T. R. Ramachandra Aiyar, L. A. Govinda Raghava Aiyar, L. S Veeraraghava Aiyar and T. R. Krishnasami Aiyar for Respondents.

The Court delivered the following

Judgments *The Chief Justice*:—This is a suit for rent. The claim is in respect of 2 faslis before the Madras Estates Land Act 1908, came into operation, and one after. The question is, is the defendant liable to pay rent in respect of the entire area of his

* Sa. No. 505 and 511 to 522 of 12. 16th January 1919,

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holding or is he only liable to pay rent in respect of so much of his holding as was in fact cultivated during the period for which rent is claimed by the plaintiffs. The patta which is in evidence bears date the 30th June 1907 a date prior to the coming into operation of the Madras Estates Land Act. It is not clear whether there has been any formal acceptance of the patta by the defendant—it is not suggested by him there has not been, and the plaintiff's case is that the patta has been accepted. The plaintiffs do not suggest that the patta is not binding on them. In paragraph 2 of the patta we have a provision that for the lands whether cultivated or left waste by the defendant's default, rent at a certain rate has to be paid. That standing alone clearly suggests that rent is only payable on lands in fact cultivated or on lands which might in fact have been cultivated but were left uncultivated by reason of the defendant's neglect. We have a later provision in the patta, clause 6, that if the defendant finds it impossible to cultivate or does not want any portion of the lands comprised in his holding he should apply for relinquishment, I shall have to refer to that in a moment: all that is necessary to say now is that so for as that particular provision in the patta goes it does help the plaintiffs' contention. Now the issue and the only issue with regard to the question and it is an issue of fact—is this. "Is the whole lands comprised in the account cultivable and is waste due to the neglect of the ryots." The issue seems to have been framed on the assumption that the defendant was only liable to pay the rent in respect of land which was cultivable, and which was not cultivated by reason of the neglect of the defendant. According to the form of the issue—and it has not been suggested the issue is wrong—the plaintiff had to prove two things, first that the land in respect of which he claims rent was cultivable, secondly, that it was on account of the neglect of the defendant that cultivable land had not been cultivated. That this was the plaintiff's case—at any rate in the Court of first instance, is clear from the opening words of the judgment of the Deputy Collector: "the plaintiffs allege that the defendants have left the lands to lie waste and this was due to their neglect, and that rent is consequently payable for the same." There is no finding that the lands were

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allowed to remain uncultivated by reason of the neglect of the defendants. Inferentially the findings are all the other way. The findings of the District Judge are:— "The lower Court found that the lands are peculiarly unproductive and that the same field cannot be cultivated every year and I see no reason to disagree." Again, "there is also no doubt that until fasli 1316 the custom was to charge only for the areas actually cultivated each year." Now, what have we to guide us to what was really meant when this patta was accepted? First, we have the admitted fact that up to the granting of this patta the plaintiffs only charged for the areas actually cultivated. Unless there was some indication to the contrary there is a presumption that the parties intended that their respective obligations should continue to be the same. That that was the intention as it seems to me, is borne out by the provision in the patta itself contained in cause (2) to which I have already referred. It seems clear that in the Court of first instance no reliance was placed upon the provisions of the Estates Land Act. In the District Court an attempt was made to set up a case under the act which had been passed subsequently to the granting of the patta which is in evidence. The plaintiffs relied upon S. 4 and the definition of "rent" contained in S 3 subsection 11. S, 4 says that the landlord is entitled to collect rent in respect of all ryoti land in the occupation of a ryot. Prima facie it is so, but if the evidence shows that it was not the intention of the parties that he should collect rent in respect of all land in occupation of the ryot but should collect rent only in respect of the land in fact cultivated by the ryot, of course the intention of the parties overrides the provision of the act. This section of the Act merely lays down the general rule, in my opinion, can be displaced by evidence as to what the parties meant and intended.

As regards clause 6 of the patta, that no doubt supports the plaintiff's contention. We were referred to a case reported in *Vedantacharar* v. *Iyyasami Mudali* (1) where a provision similar to this was objected to. The Court took the view that such a provision was unreasonable and they went on to observe the

(1) (1881) I. L R. 4 M. 322.

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removal of the clause would not, of course affect the landlord's right to collect the whole rent notwithstanding that lands are left uncultivated."

In that case the report does not state all the terms of the patta. Here, reading the patta as a whole, the intention of the parties seems reasonably clear. I think the conclusion arrived at by the Deputy Collector is right, and that the decree of the lower Court should be set aside and that of the Deputy Collector restored with costs here and in the Court below.

This judgment will govern Second Appeals Nos. 511 to 522 of 1912.

Tyabji J:—I agree in the order proposed by the learned Chief Justice.

This appeal arises out of a suit for rent under S. 77 of the Estates Land Act. The question that is involved seems to me to be, on what basis the rent of the land in the occupation of the defendants is to be calculated. The special Deputy Collector proceeded on the basis that the rent should be calculated in respect of the years in question,—namely faslis 1316, 1317 and 1318, in the same manner in which the rent had been calculated for the previous faslis and he therefore came to the conclusion that the plaintiff was entitled to a decree for Rs. 42-6-3. The basis on which the rent was calculated in the previous faslis was that the plaintiff was paid by way of rent a sum of money determined with reference to the land actually cultivated by the tenant: it was not determined with reference to the extent of the land occupied by the tenant. In appeal, the District Judge gave to the plaintiff a decree for Rs. 111-5-7 in respect of arrears of rent and the basis on which he proceeded was that rent should be calculated in other respects in the same way in which it was calculated in previous years, but that though in the previous years it was calculated with respect only to the portion actually cultivated by the tenant, it should in respect of the arrears in dispute be calculated as though the whole land in the occupation of the tenants had been cultivated. The District Judge was of opinion that S. 4 of the Madras Estates Land Act required him to do so. From the penultimate paragraph

of his judgment it would appear that the learned District Judge was loth to come to the conclusion he did but that he thought that the Act left him no option With all respect to the learned District Judge it seems to me that he has misunderstood the provisions of the Madras Estates Land Act. S. 4 gives the right to the landholder to collect rent in respect of all the ryoti land in the occupation of a ryot. That section by itself does not suffice for the determination of the total amount of rent that has to be collected. The amount of the rent to be collected can be determined only if both the extent of the land in respect of which rent is to be charged and the rate at which the rent is to be calculated are known.

The way in which the rate of the rent is to be calculated is fixed by Chapter III of the Act. The first section of that chapter is S. 24 which lays down that " the rent of a ryot shall not be enhanced except as provided by this Act". It is evident that if in respect of the same land the ryot is made to pay a higher rent, then there is an enhancement of the rent. The learned Judge's error seems to me to have arisen from his considering that the rent paid in the previous years was not in respect of all the land in the occupation of the ryot. It was in fact in respect of all the land though the mode in which the amount payable was determined in the past was by reference not to the extent of all the land in the occupation of the tenant but to the extent of land cultivated. There is nothing in the Act which makes it necessary to alter this method of determining the amount of rent payable nor does the Act provide that the landholder may exact a higher rent from the tenant for the same piece of land because he is entitled to obtain rent in respect of all the land in the occupation of the ryots. On the other hand the provisions of Chapter III of the Act lay down explicitly that the basis on which the rate of rent is to be determined is to be presumed to be the same as that on which it has been recovered by the landlord in the previous faslis. Now, the basis on which the rent has been recovered in the past in respect of the lands in question seems to me to be perfectly clear and legal. On the facts found, it is not questioned that the lands could not all be cultivated and it seems to have been clearly understood and agreed upon between the

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Tyabji J.

landlord and the tenant that the rent had to be paid by a calculation based on the land actually cultivated by the tenant. That is a basis of calculation which is capable of being made perfectly certain and capable of being adhered to. I see no reason why the same basis should not be continued to be utilized for the purpose of calculating the rent and it seems to me the act expressly provides that the same basis shall be continued in the absence of another agreement being proved.

The plaintiff also relied on Exhibit C which purports to be a patta tendered to the defendants. The plaint refers to this patta as having been tendered. It is not alleged in the plaint that the patta was accepted. There is no reference in the judgment of either Court to the fact of the pattas having been accepted, at least so far as our attention has been drawn to the judgments, still less is it alleged that there is any finding to the effect that the patta has been accepted. It is true that the learned District Judge refers to the patta and apparently considers that the rights of the parties are to be determined with reference to the contents of the patta: but that could only be so if the patta was in the nature of a contract entered into between the parties and valid under the Estates Land Act. The plaintiff has not proved those facts which are necessary in order that such a contract may result. It is not contended before us that the patta can affect the rights of the parties without being accepted, and it is admitted that the rights of the parties must continue to be what they were before, unless there is a patta tendered and accepted which alters the relation between the parties. We have clear findings as to what the rights of the parties were, previous to the tender of the patta. Both the Courts are agreed as to that, and those findings are, as I have indicated above, entirely in favour of the decree passed by the Special Deputy Collector. It seems to me therefore to be unnecessary to deal with the construction of the pattas, but I see no difficulty in reconciling clauses 2 and 6 of the patta. Clause 2 lays down that when the land is left waste by the neglect of the tenant, rent shall be charged in respect of such land: apparently not otherwise. Clause 6 lays down that in case the tenant wishes to relinquish any land then he should apply to the landlord. These two clauses

seem to me to be reconcilable on the basis that failure to cultivate under circumstances which would be neglect on the part of the tenant under clause 2 can be prevented from being so considered by giving previous intimation to the landlord under clause 6 to the effect that the tenant does not intend cultivating the land.

Segu Rowthen v. Alagappa Chetty.

Tyabji J.

I consider however that the rights of the parties have to be determined irrespective of Exhibit C. For these reasons I agree that the appeal should be allowed with costs.

This Judgment will govern Second Appeals Nos. 511 to 522.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Ramanathan Chetty and others minor by guardian Alagammai Achi. } *Appellants* * *in C. M. A.* 210 *of* 1911 *Petitioners.*

v.

Kasi Visvanathan Chetti } *Appellant in C. M. A.* 211 *of* 1911 *Petitioner.*

Arunachalam Chetti *Respondent in both.*

Ramnatha Chetty v. Arunachellum Chetty.

Sadasiva Aiyar J.

Civil Procedure Code, S. 47, O. 21, R. 90—Execution sale—Stay order by High Court—Telegram from Vakil intimating order—Sale, notwithstanding—Power of a lower court to proceed with sale—Order effectual from the date of making, unless order states to the contrary—Invalidity of sale—Substantial injury not necessary to set aside.

A sale of property was commenced on the 17th and concluded on the 21st July 1911. On the 20th the High Court passed an order directing an *ad interim* stay of sale. This was communicated. The telegram from the vakil who appeared for the petitioner in the High Court intimating the order was produced before the Court and the Court was asked to stay the sale. In the absence of official confirmation, the court declined to act on the telegram and directed the sale to proceed. The official communication was received only after the sale was concluded.

Held that the sale was invalid.

Further, that in order to set aside a sale held under the circumstances it was not necessary to allege and prove substantial injury.

Per Sadasiva Aiyar, J.:—Unless the order of stay or injunction passed by the superior Court makes it a condition that the order shall take effect only from the date of its communication such order suspends the power and jurisdiction

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*C. M. A. Nos. 210 & 211 of 1911. 26th November 1913.

Ramnathan Chetty. v. Arunachellam Chetty.

Sadasiva Aiyar J.

of the lower Court to conduct further proceedings from the moment the order of the superior Court is passed.

Satinath Satidar v. *Ratanmani Nashar* (1) *Hemchandrakar* v. *Mathur Santal* (2) *followed*; *Muthukumarasami Rowther* v. *Kuppusami Aiyengar* (3) *Bisseswari Chowdhrany* v. *Hurrosunder* (4) dissented from.

Appeal from the orders of the Court of the Subordinate Judge of Ramnad in C. M. P. Nos. 322 and 323 of 1911 in E. P. No. 34 of 1911 in O. S. No. 125 of 1908 on the file of the Chief Court of Lower Burma.

Hon. T. V. Seshagiri Iyer for L. A. Govindaraghava Iyer and A. S. Visvanatha Iyer for Appellant.

M. O. Parthasarathi Iyengar, and S. T. Srinivasagopalachari for Respondents.

The Court delivered the following

Judgments:—*Sadasiva Aiyar J.*—The facts have been set out in the judgment of my learned brother and it is unnecessary for me to repeat them. The petition put in by the 1st defendant's sons to set aside the Court auction sale is filed by them not on the ground that they are also parties to the decree (in which the sale was held), as represented by their father the 1st defendant, but as independent persons who owned shares in the property sold and who are entitled in consequence to file a petition under Order XXI, R. 90 (old section 311) to set aside the sale on the ground of material irregularity and consequent substantial injury. I agree with the lower Court in its conclusion that there was no material irregularity in publishing and conducting the sale except that the sale was conducted and concluded after the High Court's order of stay which is, of course a very material irregularity. No substantial injury is proved to have been caused by any such material irregularity. The property was estimated by the Amin as worth only 56,000 and odd rupees and it was sold for 68,000 and odd rupees.

The first defendant from his conduct in these execution proceedings has clearly proved himself to be a cunning litigant and the affidavit produced on his behalf is not reliable even

(1) (1911) 15 C.L.J. 335. (2) (1912) 16 C.W.N. 1031.
(3) (1909) I.L.R. 33 M. 74. (4) (1897) 1 C.W.N. 226.

Ramanathar Chetty v. Arunachellam Chetty. — Sadasiva Aiyar J.

though supported by a telegram from one Palaniappa Chetti who has not been examined. The want of bidders, I am inclined to hold was due to the litigious nature of the 1st defendant who had set up his mother-in-law to file claim petitions on behalf of his (the 1st defendant's sons) to bring a suit on their behalf, to put in a revision petition on their behalf against the claim order and to do several other acts, more in order to delay and defeat the decree-holder than with the *bona fide* object of prosecuting any tenable claim. Purchasers will naturally be chary of making bids for the property belonging to the 1st defendant and his sons, as they are sure to purchase a protracted litigation along with the property. A. A. O. No. 210 of 11 in which the first defendant's sons are the appellants must therefore in my opinion be dismissed. The parties will bear their respective costs.

Coming to A. A. O. No. 211 of 11, this appeal arises out of a petition filed under S. 47, C.P.C. and also under O. XXI, R. 90 by the 1st defendant himself. So far as his application to set aside the sale is grounded on irregularity and substantial injury under O. XXI, R. 90 it cannot be granted for the reasons already set out by me in A. A. O. No. 210 of 11. The contention under S. 47 of the C. P. C. is based on the following facts:—

The first defendant's sons put in a claim petition for release of their shares in the attached houses.

The Subordinate Judge dismissed the claim petition on the 15th July 1911. On the 20th July, 1911 C. R. P. No. 378 of 1911 was filed in the High Court to revise the Subordinate Judge's order dismissing the claim petition. On that same date (20th July 1910) an *exparte* order was obtained from a Judge of this Court stopping all further proceedings in the matter of bringing the attached house to sale in execution of the decree. Notwithstanding the stay order, the sale of the properties was concluded on the 21st July 1911. The question is whether such a sale is not wholly illegal as having been conducted by the Subordinate Judge's Court in violation of an order from a superior Court staying the sale. In *Muthukumarasami Rowthar Minda Nayinar* v. *Kuppusami Aiyangar* [1] it was held following *Bissesswari Chowdhrany* v. *Hurrosunder Muzumdar* [2] that the

(1) (1909) I. L. R. 33 M. 74. (2) (1897) I. C. W. N. 226.

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stay order passed by a superior Court does not become effective till it is communicated to the inferior Court, and that an execution sale if made by the inferior Court in ignorance of the stay order is a legally valid sale. With the greatest respect, I am unable to agree with this decision though it is in accordance with the case in *Bissesswari Chowdhrany* v. *Hurrosunder Muzumdar* [1] It seems to me that, unless the order of stay or order of injunction passed by the Superior Court made it a condition that that order shall take effect only from the date of its communication to the lower Court; or to the party enjoined (as the case may be) an order suspends the power and jurisdiction of the lower Court to conduct further proceedings *from the moment when the order of the superior Court was passed.* I do not think that I could put the reasons for this view better than they have been enunciated in the judgments in the case of *Satinath Satidar* v. *Ratanmani Nashar* [2] and *Hamchandrahar* v. *Mathur Santal* [3] and I shall therefore not attempt it. In the result, I would set aside the sales concluded on the 21st July 1911 by the Subordinate Judge's Court of Ramnad as having been held without jurisdiction after the passing of the order of this court staying the sale, which order was dated 20th July 1911 and I would direct that a fresh sale be held after fresh proclamation. A sale held without jurisdiction may, in a sense be said to be a sale vitiated by material irregularity, but it is unnecessary to rely on section 311 (Order 21, Rule 90) in order to set aside such a sale, that is, it is unnecessary to prove substantial injury also The irregularity is so grave that, in the words of their Lordships of the Privy Council in *Malekarjan* v. *Narahari* [4] "it is sufficient by itself, to entitle" the judgment-debtor "to vacate the sale." Parties will bear their respective costs in both courts, I might be permitted to remark that in respect of a stay order passed by an appellate Court, it seems to me advisable, in order to avoid future complicated litigation to provide usually that the order shall take effect only from the time the order is communicated to the lower Court which has to guide itself in accordance with such order.

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(1) (1897) I. C. W. N. 226.
(2) (1911) 15 C. L. J. 335.
(3) (1912) 16 C. W. N. 1081.
(4) (1900) 25 Bom. 337 at p. 348.

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Spencer. J.

Spencer, J:—The facts, which are not denied, are that a sale of the appellant's immoveable properties in execution of decrees was commenced on the 17th July and concluded on the 21st July 1911.

On July 20th an order was passed in the High Court directing *ad interim* stay of the sale. A telegram was sent by the vakil in Madras to the vakil in Madura informing him of the result of the petition in the High Court, and it reached Madura soon after noon the same day. The Subordinate Court of Ramnad was thereupon moved by a petition accompanied by affidavit to stay the sale.

The Subordinate Judge refused to act on the telegram when he had not received official confirmation of the information, rejected the application and directed the sale to proceed. The sale was completed on the following day and was subsequently confirmed on September 2nd after the High Court's stay order had been received. Meanwhile, the stay order having proved ineffective was cancelled by the High Court on August 3rd. Applications to set aside the sale were dismissed by the Subordinate Judge on August 29th, and the judgment-debtor and his sons now appeal.

Arguments have been addressed to us on the questions (1) whether the stay order of the High Court took effect from the time when it was pronounced or from the time when it was officially communicated to the court under whose orders the sale was held; (2) whether the sale that was completed in spite of such an order was thereby invalidated, or whether a mere irregularity has been committed for which the judgment-debtors must prove that they have sustained substantial injury before they can claim to have the sale set aside.

The first of these questions has been the subject of judicial decision in *Muthukumarasami Rowther Minda Nayanar* v. *Kuppusami Aiyyangar*, (1) *Bessesswari Chowdhrany* v. *Hurrosoondar Mazoomdar* (2) *Hukumchund* v. *Kamalanand Singh*, (3) and *Manyan* v. *Mansingh* (4).

In the above mentioned judgment of this High Court the earlier decision of the Calcutta High Court which declared

(1) (1909) I. L. R. 33 M 74; (2) (1897) 1 C. W N. 226.
(3) (1906) I. L. R. 33 C. 927 (4) (1880) I. L. R. 2 A. 686.

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that an order of an appellate Court under S. 545, C. P. C. (now Order XLI, Rule 5) to stay execution of a decree from which an appeal is pending, being of the nature of a prohibitory order, would only take effect when communicated, was followed in preference to the later decision of the same High Court.

In Freeman on Executions articles, 32 and 33, it is stated " A supersede—as properly so called is a suspension of the power of the Court below to issue an execution on the judgment, or decree appealed from; or if a writ or execution has issued, it is a prohibition emanating from the Court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence". The effect of an execution issued pending a stay thereof granted by the Court is considered and declared to be, of course, irregular and capable of being quashed on motion. The author then proceeds to make the following observation : " But it may happen that for want of such motion the execution is never arrested and property is seized and sold thereunder. In such case, as in all other cases of irregular execution, the authorities are conflicting, some asserting that the writ, having erroneously issued remains in force till the error is corrected, and others maintaining that, the Court for the time being having no power to issue the execution the writ is void."

I consider that there is much force in the observation of Woodroffe, J. in *Hukumchand* v. *Kamalanand Singh* (1) that there is no reason why the operation of an order of the High Court should be made contingent, say, upon the due performance of the duties of the Post Office.

To adapt the words of that learned Judge to the circumstances of the present case, before the lower Court completed the sale, this court had ordered that it should not be done. In the same case, Mookherjee, J. observed that the moment that the High Court has made an unconditional order for stay of execution, it becomes an operative order and suspends the power of the Subordinate Court to carry on further the execution proceeding.

(1) (1906) I. L. R. 33 C. 927.

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The same idea found expression in the words of Westbury L. C. *in re the Risca Coal and Iron Company* [1]. "I shall abide by the rule of convenience; certainty in the matter is convenience; certainty you attain by abiding by the date of the order; uncertainty you introduce when you depart from that date. A variation from the common rule of abiding by the record is introduced by a departure from that date. Great laxity of practice would be introduced and encouraged by a departure from that date."

It is not necessary in these proceedings that we should go to the length of deciding whether the view taken in *Muthukumaraswami Rowthar Minda Nayanar* v. *Kuppusami Aiyangar* [2] that the order only became effective when communicated to the Subordinate Court, was right or wrong. The circumstances of that case were sufficiently dissimilar to distinguish it from the present case. In that case there was no communication of the order received at all when the sale took place. In this case the court had information,. though of an unauthenticated character, and it was moved to stay the sale.

In *Bessesswari Chowdhrany* v. *Horroo Sunder Mozumdar* [3] it was held that a sale was not void in law if held under circumstances in which there was nothing to fix the decree-holder with any knolwedge that the sale was ordered to be postponed, The court executing the decree knew nothing of it, there was a valid subsisting order for sale and the sale took place in pursuance of that order. It is implied that it could not be so if the court and the decree-holder were aware of the order of postponement. As stated in Mr. Freeman's book, p. 125 "the plaintiff and the officer charged with the execution of a writ, on being informed of a stay of execution, whether resulting from an order of court or from such a compliance with the law as to create such a stay, should discontinue their proceedings. If they persist in diregarding the stay and in acting under the execution, they are no longer entitled to its protection."

I am decidedly of opinion that the Lower Court in the present instance acted injudiciously in not postponing the sale

(1) (1861) 31 L. J. Ch. 429. (2) (1909) I. L. R. 33 M. 74.
(3) 1897 1 C. W. N. 226.

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in order to ascertain the truth of the information brought to its notice that the High Court had directed the sale to be stopped, if any doubt was felt as to the authenticity of the telegram.

This was the view taken by the Calcutta High Court in *Hemchandrakar* v. *Mathursanthal* [1] a case where a Subordinate Court refused to take any notice of a telegram from the petitioner's Vakil in the High Court intimating the orders of the High Court Similarly in *Satinath Sikdar* v. *Ratanmani Nashir* [2] where a District Munsif refusedto act on an affidavit accompanied by a letter written by a Vakil of the High Court that the High Court had ordered an *ad-interim* stay of proceedings for the ascertainment of mesne profits, it was held that the act of the Munsif amounted to a contempt of the authority of the High Court, and that the arm of the High Court was long enough to reach any person who behaved in such a manner, and that the order was wholly without jurisdiction and should be cancelled.

In *Mianjan* v. *Mansingh* [3] it was held that a sale held notwithstanding an order of postponement was unlawful and invalid and should not have been confirmed seeing that it was wholly illegal. In *Nonid Singh* v. *Mussumat Sohunkoer* [4] the sale was not treated as void but was set aside by the court treating the order for postponement as invalidating the sale notification, in the publication of which there was consequently considered to be an irregularity. This course must be adopted here. There can be no doubt that a substantial rumour that the High Court had ordered that the sale should not proceed was calculated to affect the freedom with which intending bidders would be tempted to come forward and offer bids, if they possessed a knowledge that the whole proceedings were likely to be rendered infructuous in consequence of the order already made.

In this case also the auction lists printed in A. A. O. 211 of 11 show that the plaintiff's vakil was the only bidder on the 20th and 21st July. I therefore think that there is ground

(1) (1912) 16 C. W. N. 1081 (2) (1911) 15 C. L. J. 335
(3) (1880) I.L.R. 2 A. 686 (4) (1872) 4 p. N. W. P. H. C. Rep. 135.

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to suppose that the judgment-debtor sustained substantial injury by the properties sold on these two days being knocked down to the plaintiff. The Subordinate Court may also be treated as having acted without jurisdiction when it continued a sale which the High Court had ordered to be stopped. I will allow both these appeals to the extent of setting aside the sales held on July 20th and 21st, and I would order the parties in these appeals to bear their respective costs in both courts in consideration of the obstructive attitude of the judgment-debtors throughout the execution proceedings.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller.

Naduvil Edom Kelu Achan ... *Petitioner* * *(Plaintiff)*.

Ayya Pattar's son Varadaraja Iyer. *Respondent (Defendant)*

Naduvil Edom Kelu Achan v. Varadaraja Iyer.

Limitation Act, Art. 116—Malabar Law—Suit for purapad—Assignee of Kanomdar—Both Kanam and assignment registered—Undertaking to pay purapad in the deed—Liability by privity of estate and not by reason of registered contract.

In a suit by the Jenmi against the assignee of the Kanomdar for arrears of purapad, it was contended that Art. 116 of the Limitation Act applied first because the Kanom was registered secondly because the deed of assignment also was a registered deed and contained or implied an undertaking by the assignee to pay the purapad.

Held that the liability of the assignee was by reason of his privity of estate and not by reason of any contract in writing registered between the Jenmi and the assignee and therefore the article was inapplicable.

Petition under Section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Palghat in Small Cause Suit No. 507 of 1912.

C. V. Ananthakrishna Aiyar for Petitioner.

K. R. Subrahmania Shastry for Respondent.

The Court delivered the following

Judgment :—The question is whether the Jenmi is entitled to recover six years arrears of rent from the assignee of the Kanom or only arrears for three years. The original Kanom is not for a term of years expressed, but is in writing and registered, and the assignment was also it is said in writing and registered, and the assignee obtained a decree against the Jenmi for a renewal deed, which it is stated, has not yet been executed. For the petitioner it is contended that Article 116 of the 1st schedule of the Limitation Act is applicable because the assignee has im-

* C. R. P. No. 906 of 1912. 23rd December 1913.

Naduvil Edomkelu Achan. v. Varadaraja Iyer.

pliedly contracted with the Kanomdar to pay the rent to the Jenmi, and the Jenmi can sue on the contract which is for his benefit. Reliance is placed on *Krishnan Nambiar* v. *Kannan* [1] and some cases which have accepted the same view, for the position when a covenant is implied by law in a contract of transfer, if the deed effecting the transfer is registered, Article 116 of the Limitation Act will apply to a breach of the implied covenant. That principle does not seem to me to come in question here, because I do not understand the assignee to contract with the Kanamdar for the benefit of the Jenmi. The obligations of the assignee to the Jenmi have been held in this country to be based on a privity of estate created by the assignment: *Kunhajan* v *Anjelu* [2] and *Monica Kitheria Saldanha* v *Subraya Hebbara*[3]. No doubt it may be said that the effect of taking the assignment is to raise by implication a promise by the assignee to pay the rent (18 Halsbury para 1133), but that is I think a promise for the benefit of the lessee and not a promise for the benefit of the lessor. The lessee remains bound to pay the rent under his contract and the agreement between him and the assignee is for his benefit and not for that of the lessor. The non-payment of rent to the lessor, though it may be a breach of an implied promise to the lessee, is not therefore a breach of any covenant on which the lessor can sue and consequently *Krishnan Nambiar* v. *Kannan* [4] is not applicable and article 116 of the Limitation Act also is not therefore applicable to the breach. Moreover the deed of assignment is not exhibited in this case and I am unable to say what its contents are, but even assuming that it contains an express promise to pay the rent to the Jenmi, Mr. Ananthakrishna Aiyar's client could not succeed for the suit is not on the deed of assignment but on the original Kanom. As regards the original Kanom it seems clear that the non-payment of the rent reserved under the Kanom is not a breach by the assignee of any contract with the lessor.

Mr. Ananthakrishna Aiyar argued that the contract had in some way, devolved upon the assignee, and it was to enable him to substantiate that contention that I adjourned the hearing but he did not pursue that point further in his argument at the adjourned hearing.

I dismiss the Petition with costs.

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1. (1897) I. L. R. 21 M. 8.
2. (1889) I. L. R. 17 M. 296.
3. (1907) I. L. R. 30 M. 410 at p. 411.
4. (1897) I. L. R. 21 M. 8.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller, and Mr. Justice Spencer.

Ponnusamy Padayachi, and another } * *Appellants.* (*Nos.* 2 *and* 3 *Defendants*)

v.

Karuppudayan, and another } *Respondents* (*Plaintiff and* 1st *Defendant.*)

Ponnusamy Padayachi *v.* Karuppudayan.

Estates Land Act, Ss. 6, 8, 158, 157, 163—*Jurisdiction of Civil Courts—Ejectment—Inamdar—Tenant under time-expired lease for 3 years at the time of the passing of the Act—Occupancy right found not to be in tenant—Presumption that Inamdar has occupancy by grant or acquisition—Not "Estate"—Tenant of old waste for less term than 5 years—Liable to eviction under S.*153-*Not affected by S.* 157 "*Admitted as ryot*" *in S.* 163—*Meaning of—Tenant in possession after expiry—lease not recognised by landlord—Liability to eviction under S.*163.

Per Miller, J:—When it is found that a tenant on an Inam has no occupancy right, the presumption is that it is in the Inamdar either by the original grant or by prior or subsequent acquisition, in either of which cases, the land is not an "Estate" and the tenant is liable to be evicted in Civil Courts as an ordinary lessee.

The word "acquire" in the exception to S. 8 cannot be restricted to particular modes of acquisition. It includes acquisition by surrender or abandonment.

Per Spencer, J:—The proviso to S. 153 takes the case of non-occupancy ryots of old waste holding under expired leases granted before the passing of the Act out of the jurisdiction of the Collector's Court. In such cases, the landlord has got the same rights as he would have had if the Act had not been passed and can enforce them in Civil Courts.

S. 157 has not the effect of nullifying the provisions of S. 158 but only prohibits a tenant of old waste being ejected as such even if he has signed an agreement to quit.

Achapparaju v. *Krishnayachendralu* 1 explained.

A tenant of old waste who at the time of the passing of the Act was in possession under a time expired lease and whom the landlord has not, by accepting rent or otherwise, recognised as tenant is liable to be evicted in Civil Courts under S. 163 of the Estates Land Act.

Words "admitted as ryot" explained.

Second Appeal from the decree of the District Court of South Arcot in A. S. No. 64 of 1912, preferred against the decree of the Court of the District Munsif of Vridhachalam in O. S. No. 1840 of 1910.

L. A. Govinda Raghava Aiyar for Appellant.

C. V. Anantakrishna Aiyar for Respondent.

The Court delivered the following

Judgment:—*Miller, J.*:—Mr. C. V. Ananthakrishna Aiyar Vakil for the first respondent does not support the view of the case taken by the District Judge but argues that the land in ques-

* S. A. No. 866 of 1913. 27th January, 1914

1. (1913) 24 M. L. J. 402.

Ponnusamy Padayachi v. Karuppudayan.

Miller, J.

tion is not a part of an estate within the meaning of the Madras Estates Land Act, and contends also conceding that the position of the 2nd defendant is that of a ryot of old waste, that by virtue of the proviso to S. 153 of the Madras Estates Land Act the jurisdiction of the Civil Courts is nevertheless not ousted. Mr. L. A. Govinda Raghava Aiyar, Vakil for the appellants accepting as the position of his clients that of a non-occupancy ryot, being a ryot of old waste, argues on the strength of *Atchaparaju* v. *Krishnayachendralu* [1] that S. 157 nullifies the effect of the proviso to S. 153 which otherwise would, he concedes, be applicable to the facts of the case and so would save the jurisdiction of the Civil Court. The District Judge has not decided the question whether the land is or is not part of an Estate and the District Munsif has decided that it is part of an Estate. I am of opinion that on the facts found and not now contested, that the 2nd defendant has no occupancy right, the presumption arises that the occupancy right was either granted to or acquired by the inamdar. That presumption was the basis of the finding of the Subordinate Judge of Tanjore in *Rajaram Rao* v. *Sundaram Aiyar*[2] and was, as I understand the judgment of Sankaran Nair J in that case, accepted in this Court as sufficient to attract to the case exception to S. 8 of the Madras Estates Land Act.

It is argued here on the strength of certain cases in Bombay that if we presume as we must in this case presume, the original grant to have been the grant of the revenue only, the fact that the occupant has no occupancy right is not sufficient to show that the inamdar has acquired that right. These cases do not support that contention. In *Ramachandra* v. *Venkatrao*, [3] it is said that the Saranjamdar may deal with the unoccupied lands and cultivate by himself or through tenants not as grantee of the soil but for purposes of revenue, and that observation is explained in *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat*[4] as equivalent to a decision that the Saranjamdar may acquire occupancy rights which would be unaffected by the resumption of the grant. Far from supporting the appellants this latter case supports the view taken by the Subordinate Judge in *Rajaram Rao* v. *Sundaram Aiyar*. [5] The other case in *Rajya* v. *Balakrishna Gangadhar*, [6]

1. (1918) 24 M.L.J. 402.
2. (1910) M W.N. 566.
3. (1882) I.L.R, 6 B. 598 at page 608.
4. (1886) I.L.R. 10 B. 112 at page 117.
5. (1910) M W.N. 566.
6. (1905) I.L.R. 29 B. 415.

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Miller, J.

where it is pointed out at page 420 that lands unoccupied at the time of the grant would be Sheri that is, as I understand it, private land, (vide *Ganapatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat* [1], and if that is so, the case does not help the appellants. It seems to me that these cases support the view that when it is found that a tenant has no occupancy right in his holding, and the land is not private land, the presumption is that the occupancy right is in the landholder either by the original grant or by prior or subsequent acquisition. It is argued that under the exception to S 8 of the Madras Estates Land Act, the landholder must be shown to have acquired the occupancy right in some particular way, but I cannot accede to that argument. I agree with the view taken upon that point by Spencer J. *Suryanarayana* v. *Potanna* [2]. It is, I think an unsafe method of construing the statute to restrict the meaning of the word 'acquire' in the exception to S 8, merely on the ground that in S. 6 (2) and for the purposes of that section, the legislature does not permit the land-holder before the lapse of ten years indefeasibly to acquire the occupancy right in land abandoned or surrendered. The exception to S. 8 is referred to in S. 6 (2) and the effect of that may be that in construing S. 6 (2) we shall have to exclude surrender and abandonment from the methods of acquisition by which a land-holder may at once acquire indefeasibly an occupancy right, but that does not appear to me to afford a reason for restricting the meaning of the word 'acquire' when the context does not compel us to do so. In the present case, we have to take it that the inam is one to which S. 3 (2) (d) applies and consequently that there is a Kudivaram right in the land. That Kudivaram right must be in some one, and it is not shown to be in any third party: it is, *ex concessis*, not in the 2nd defendant, and it must, therefore so far as I can see, be in the landholder, that is, for our purpose in the plaintiff—and if we cannot, in the circumstances, hold that it was granted to him along with the Melwaram or that he had it before the grant (in either of those cases the 2nd defendant is out of Court) it follows to my mind that he has acquired it since the grant. The land is therefore not part of an estate and it is not contended that on the merits the 2nd defendent has any claim to remain in possession.

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1. (1885) I.L.R. 10 B. 112 at page 118. 2. (1918) 26 M. L. J. 99.

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On this ground, and without deciding the other questions, I would dismiss the second Appeal with costs.

Spencer J:—The 1st appellant is a tenant of the old waste in a Shrotriam village within one of the meanings of clause 7 of S. 3 of the Madras Estates Land Act, that is, he occupies ryoti land in respect of which before the passing of the Act the landholder had obtained a final decree of a competent Civil Court establishing that the ryot had no occupancy right. I take the words "final decree" to mean what the Full Bench in *Gorakkla Kanakayya* v *Janardana Padhi* [1] decided they meant, *viz.*, a decree which has ceased to be modified on appeal, and I refer to the judgments filed G series, K and L.

In fact 1st appellant's pleader does not now contend that his client possesses any occupancy right.

Exhibit C 2 is the counterpart of the lease for 3 years executed by 2nd defendant to the landholder on May 15th, 1905. It expired on May 15th, 1908, but on its expiry, the tenant held over. The Madras Estates Land Act came into force on July 1st 1908. No right of occupancy accrued to him as being in possession at the date of the introduction of the Act by virtue of S. 6, because that section especially excepts old waste.

The question is whether the 1st appellant is liable to be evicted, and if so, whether the 1st respondent can obtain his remedy in a Civil Court. I take it that the 1st respondent (plaintiff) who purchased this land under Exhibit A, sale deed of August 2nd, 1908, from 2nd respondent, had no power of evicting tenants which the 2nd respondent did not himself possess previously.

Certain powers are given to landholders under section 153 of the Act of evicting non-occupancy ryots and No. 19 part A of schedule to the Madras Estates Land Act shows that suits to enforce those powers must be brought in a Revenue Court. The present case does not fall under any of the grounds detailed in the body of that section. The District Munsif held, I think rightly, that the proviso to S 153 has the effect of taking the case of non-occupancy ryots holding under an expired lease

1. (1910) 21 M. L.J 31. S. O. (1910) M. W. N. page 841.

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granted before the Act out of the jurisdiction of the Collector's Court. This proviso runs:—

"Nothing in this Section shall affect the liability of any "person who is a non-occupancy ryot according to the provi-"sions of this Act to be ejected on the ground of expiry of the "term of a lease granted before the commencement of this Act."

It is plain that the provisions of S. 153 are not exhaustive of all possible cases of eviction. Clause (*e*), for instance, provides for tenants under leases for more than five years holding over. There is no provision for tenants under shorter leases holding over. It is absurd to suppose that the legislature intended to favour persons on short tenure more than those on long tenure and to protect the former class from eviction under any circumstances. For such persons there exist the general provisions of law, among which one is that on the determination of a lease the lessee is bound to put the lessor into possession of the property. Section 19 of the Act shows that its provisions were not intended to be exhaustive of all the relations of landlord and tenant.

When the Bill was being passed into law there was a discussion whether the Revenue Courts were not usurping too many of the powers of the ordinary Civil Courts of ejecting trespassers, among whom were included persons occupying ryoti land otherwise than by inheritance or legal transfer and without being admitted as ryots. (See pages 500-507, Fort St. George Gazette of March 17th 1908). The introducer of the amendment Bill explained the necessity for meeting the case of tenants under a lease for a term not exceeding 5 years holding over after its expiry. Such cases were therefore by the proviso taken out of the Act, and consequently out of the jurisdiction of Revenue Courts also (See pages 4-5 of the proceedings of the Council of Fort St. George, 1909, Vol. 37).

I proceed to consider whether the appellant can claim the benefit of any other sections of the Act which were relied on. S. 9 is a general section. It simply declares that no landholder shall, as such, be entitled to eject a ryot from his holding or any part thereof otherwise than in accordance with the provisions of this Act. For instance, a ryot cannot under this Act be ejected for non-payment of rent as he might be under the Repealed Act VIII of 1865. This section cannot be construed as overriding

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S.163 and the proviso to S. 153. S. 151 deals with ejectment for damaging the holding which is not the case here.

S. 157 is designed to prevent tenants of old waste from contracting themselves out of their right to remain in possession so long as they have not given cause under other provisions of the Act to their landholder to eject them. Such was the case dealt with in *Atchaparaju v Krishnayyachendralu* [1]. The decision first states that the effect of the proviso to S. 153 was of course to entitle a landholder to eject a non-occupancy ryot on the ground of the expiry of a lease granted before the passing of this Act. It proceeds to state that S. 153 does not make the expiry of the lease a ground of ejectment. A perusal of clause (e) of S. 153 will show this observation to be incorrect. I do not feel sure that the learned Judges meant that the effect of S. 157 was completely to nullify the proviso to S. 153. If they intended to declare that independently of any contract a ryot of old waste whose term has expired cannot by any means or in any circumstances be ejected, then I must respectfully dissent. If it were true that S. 157 nullifies the proviso to S.153, then the amending Act, (Madras Act IV of 1909) would have partly failed in its aim. I consider that it does not nullify it. It only prohibits a tenant of old waste being ejected 'as such,' even if he has signed an agreement to quit. S. 157 makes an exception of the grounds mentioned in S. 153; and the proviso to S. 153 though enacted later, must be taken to be an integral part of the section.

S. 163 allows a landholder to treat any person who occupied ryoti land in an estate otherwise than by inheritance or legal transfer as a trespasser and to eject him by suit in the Civil Court, provided that he has not been admitted as a ryot by the land-holder. The 1st appellant in the present case maintains that he does not come under the description of one who 'has not been admitted as a ryot by the landholder', seeing that he once cultivated cultivable land other than private land under a lease from the 2nd respondent.

The meaning of admitting a person to the possession of ryoti land appears from the explanation to S. 6 of the Act to mean the acceptance by the landholder of any portion of the rent fixed for such land. A similar significance is attached by S. 116 of the Transfer of Property Act to the act of accepting rent from a

1. (1913) 24 M. L. J. 402.

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lessee. If Ss. 163, 45 and the explanation to S. 6 of Madras Act I of 1908 be read together, it is obvious that a quondam tenant is not entitled to better treatment than a trespasser on the strength of payments made under leases that expired before the Act came into operation. For the position of the tenants holding over after the expiry of their term reference may be made to the case of *Vallapalli Narasimham* v *Dronamraju Seetharama Murthy*.[1] Any claim founded on such relationship of landlord and tenant in this case is open to the objection that there has been a break in its continuity No proof has been offered that either the 1st or 2nd respondent accepted any payments of rent from the 1st appellant after his lease expired. The District Munsif finds that he was not accepted as a tenant by the landlord. He observes, "it is not pretended that 1st defendant accepted 2nd defendant as his tenant or in any way acquiesced in 2nd defendant holding the land." Therefore it appears that under S. 163 also the present suit for eviction can be maintained in a Civil Court.

The District Judge held that under Exhibit A the 2nd respondent only transferred the Kudivaram right in the suit land. It is doubtful if this is the right construction to be placed on the document. But in the view now taken of S. 163 and of the proviso to S. 153 it is unnecessary to determine this point.

The 1st respondent's pleader has attempted to support the finding of the Lower Courts on the ground that this is not an "estate" within the meaning of the Act but he has not succeeded in establishing this contention to my satisfaction. The question does not require discussion as the second appeal fails on other grounds, It should in my opinion be dismissed with costs.

PRIVY COUNCIL.

Present:—Lords Atkinson and Shaw, Sir John Edge and Mr. Ameer Ali.

On Appeal from the Court of the Judicial Commissioner of Oudh.

Bhaiya Sher Bahadur Singh *Appellant.*

Bhaiya Ganga Bakhsh Singh and others *Respondents.*

Sher Bahadur Singh v. Ganga Bakhsh Singh

Will by a Hindu—Construction—Hindu's son by a Mahomedan woman—Word "aulad" in the will—Marriage of issue with Hindu woman of Chhattri caste—

1. I. L. R. 31 M 163.

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Treatment by testator of legatee as Hindu, and marriages with Hindu as lawful—Effect of—gift of a fund to "children" in India—May include "illegitimate issue."

Where a Hindu, Janwar Chhattri by caste, had a son by a Mahomedan woman, whom he brought up as a Hindu and got married to two Chhattri women one after the other by whom he had children and made a will to the effect that the income from certain properties should go to the support of the "aulad" of his son "from generation to generation as long as his family (Khandan) was in existence."

Held, having regard to the fact that the testator treated his son as a Hindu in religion and desired that others should so treat him, that he treated his marriages with the two Chhattri ladies as lawful marriages and desired that others should so treat them he must be taken to have resolved to regard and treat the offspring of these unions as legitimate and to have desired that they should be so treated and regarded by others and in the circumstances, the proper construction of the will was to hold that by "aulad" (legitimate issue), the testator meant only the issue of these marriages and did not want to include in that term the illegitimate issue of the son by a Mahomedan concubine.

Where a gift is made by will of the corpus of a fund or a life interest in the fund to the children of the testator or of another as a class, there may be good reason in some such cases for holding that in India, **the word children includes** illegitimate children.

Appeal from a Judgment and Decree of the Court of the Judicial Commissioner, dated 26th February 1906 affirming a Judgment and Decree of the Subordinate Judge of Gonda, dated 3rd January 1905.

Maharajah Sir Drigbijai Singh of Balrampur was a Hindu of the Janwar Chhattri caste. He had relations with a Mahommedan woman Imam Bandi by whom he had a son named Jang Bahadur Singh, born in 1849. At the instance of the Maharaja, Jang Bahadur was married two Chhattri women by whom he had a son and a daughter. He was also alleged to have married a Mahommedan woman by whom he had several sons. The Maharaja who had no child by his married wife made a will by which he settled certain properties on Jang Bahadur and his descendants and certain other properties on Imam Bandi, his own mistress. In hopes of succeeding the Maharaja Jang Bahadur lived a double life, partly as a Hindu and partly as a Mahommedan. On his decease a dispute arose as to who was entitled to the property under the will made by the Maharaja in favour of Jang Bahadur's, descendants. The plaintiff who was the eldest son by the Mohammedan wife of Jang Bahadur claimed the entire property as being the eldest son of Jang Bahadur, while the respondent, Bhaiya Ganga Bakhsh Singh stated that Jang Bahadur was a Hindu, married to a Hindu woman and therefore

the plaintiff as the son of a Mahommedan woman was not legitimate and incapable of succeeding Jang Bahadur. The Subordinate Judge dismissed the plaintiff's suit which on appeal was confirmed by the Court of the Judicial Commissioner, each holding that Jang Bahadur was a Hindu inasmuch as he had his food cooked by Hindu cooks, observed the rules and customs of Hindus in eating, habitually worshipped Hindu idols, had free access to Hindu temples, wore the sacred thread and put on the tilak or caste mark of Chandan and the Hindu choti. An appeal was then preferred to the Privy Council.

Sir Robert Finlay, K.C., with him *Dube,* for the appellant contended that Jang Báhadur was the son of the Maharaja by a Mohammedan woman. He was a Mahommedan by birth but adopted the Hindu religion. He contracted marriages with Hindu girls. It was impossible to become a Hindu for the purposes of the caste, as a Hindu must be born. Act III of 1872 was the only one by which marriage between the persons of different religions was possible. Both Courts held that he was illegitimate.

Sir John Edge : He may be treated as a Hindu of lost caste.

In 1874 the Maharaja made a will in favour of Jang Bahadur and his " aulad ". Will should not be read in the light of the English Law with respect to the legitimacy of children. If acknowledged, illegitimate children could take under it. As he was born a Mahommedan his marriage with Hindu women was no marriage at all. No ceremony could make him a Hindu. He might have become a Sudie.

Ameer Ali : Sudie is a caste.

Lord Atkinson It is a case neither of Hindu nor of Mahommedan Law.

A Hindu marriage must be in the same caste. Aulad means both legitimate and illegitimate children, legitimate to be preferred, but if all were illegitimate, the eldest was to succeed.

Sir John Edge : Maharaja meant legitimate children.

He never settled it. Will should be read with reference to circumstances. Marriage of Jang Bahadur with the Hindu women was held to be valid, but it had to be proved that Maharaja intended to exclude all others.

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Reference was made to:

Orde v. *Skinner* [1], *Padam Kumari* v. *Suraj Kumari* [2], *Sespuri* v. *Dwarkadas* [3], *Bai Kashi* v. *Jamnadas* [4], *Mela Ram* v. *Thannoo Ram* [5] *and Skinner* v. *Naunihal Singh* [6].

Mayne's Hindu Law (7th edition) Sec 88 Ch. 4, p. 106, Banerji's Hindu Law (Tagore Law Lectures (1873), pp. 68, 74, Hindu Tribes and castes, pp. 22 and 23.

De Gruyther, K.C. and Eddis: On behalf of the respondents contended that according to the Hindu Wills Act children meant only legitimate children. The object of the codicil was to provide for Jang Bahadur and not for his illegitimate sons who had no claim on the Maharaja.

Sir John Edge: Hindu will could only apply to Hindu family.

In Hindu Law devise to children meant legitimate children.

Lord Atkinson: You are not using it to prove illegitimacy of defendant but the legitimacy of the other.

Ameer Ali: He wanted him to succeed.

Sir John Edge: Maharaja wished to force Jang Bahadur into the caste.

Sir John Edge: Once out of caste one cannot eat in the caste.

He might get into it by expiation—one could become a Hindu as was stated to have happened every day.

Lord Atkinson: Lyall's Asiatic Studies may be very interesting, but is there anything in the Hindu Law Books?

It was a Hindu will made by a Hindu. His outward profession was Hindu and therefore Hindu Law should apply. Hindu Law did not recognize illegitimate children.

Lord Atkinson: Your contention is that we have to deal with the will of an acknowledged Hindu and therefore Hindu Law should apply; he had grand-children whom he believed to be legitimate at the time of making the will.

Sir John Edge: The impossibility of having legitimate children had already arisen. If "aulad," were used for children then existing, it may include illegitimate children.

1. (1918) 18 M. I. A. 277.
2. I. L. R. 28 All. 458, 459 and 464.
3. (1912) 16 Indian Cases, 222.
4. (1912) 16 I. C. 188.
5. (1868) 9 Suth. W. R. 552.
6. (1913) L. R. 40 I. A. 105.

The object of the will was to provide for Jang Bahadur just to create a tenure in land. Descendants in the will meant "aulad". The construction that both legitimate and illegitimate children of Jang Bahadur were to succeed must be repugnant to the Maharaja as he got Jang Bahadur to become a Hindu. How could the word descendant mean both legitimate and illegitimate not only of Jang Bahadur but also of his children generation after generation. Jang Bahadur was a Hindu and lived as such.

Reference was made to:

Sreemuthy Soorjeemoney Dassi v. *Denobhundho Mullick* [1], *Moulvi Mohamed Shamsul Hooda* v. *Shewakram* [2]. *Radha Prasad Mullick* v. *Rannmoni Dassi* [3], *Abraham* v. *Abraham* [4], *Francis Ghosal* v. *Gabri Ghosal* [5].

Mayne's Hindu Law (7th edition p. 75) Jogendronath Bhattacharjee's Hindu Castes and Sects, Bannerjee's Hindu Law of Marriage (2nd Edition, p. 73.)

The Judgment of their Lordships was deliverd by

Lord Atkinson:—This is an Appeal from a judgment and decree dated the 26th February 1906 of the Court of the Judicial Commissioner of Oudh, which affirmed a judgment and decree dated the 3rd of January 1905, of the Court of the Subordinate Judge of Gonda, dismissing the Plaintiff's suit.

The action out of which the appeal arises was instituted on the 3rd of April 1902 by the Plaintiff as eldest son and heir of his father Jang Bahadur Singh, by a Mahomedan woman, claiming to recover the possession of the several villages mentioned in the schedule annexed to the Statement of Claim, same forming part of an estate called the Balrampur estate which had been bequeathed to the Plaintiff's father by his, the Plaintiff's, paternal grandfather, the Maharajah of Balrampur, by a codicil dated the 15th of March 1878 to the last will of the Maharajah. Possession of these villages had been taken in the year 1899 by the first Defendant, and since then retained by him. Mesne profits were claimed in respect of this possession, and a claim was added to recover possession of the moveable and immoveable property mentioned in Schedules B and C, also annexed to the Statement of Claim, or in the alternative the Plaintiff's legal share thereof, on

1. (1857) 6 M. I. A. 550.
2. (1874) L. R. 2 I. A. 7, 14.
3. (1908) L. R. 35 I. A. 118.
4. (1863) 9 M. I. A. 195; 218.
5. (1906) I. L. R. 31 Bom. 25, 31.

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the ground that the same was property acquired by the plaintiff's said father, with an additional claim for further relief.

The first Defendant, Bhaiya Ganga Bakhsh Singh, filed a written statement alleging that the Plaintiff was the issue of a Mahomedan woman with whom the said Defendant's father, Jang Bahadur Singh, had had illegal intercourse, as were also the Defendants numbered 2, 3, and 4, and that her nikah had never taken place, that his father followed the Hindu religion bigottedly, and was a Hindu from his boyhood up to his death, that he married for the first time a Hindu lady of a Surajbansi Chhattri family, that the Defendant No. 1 was the only child of that marriage, is the only legitimate son and heir at law of his father, and is consequently under the provision of the said codicil entitled to the allowance therein mentioned.

The Plaintiff replied traversing the several allegations contained in this and the other written statements filed by other Defendants, and upon these pleadings the eight issues set forth at page 884 of the Record were knit. A vast body of evidence was given bearing upon each of these issues. Many of them are no longer of importance on this appeal, which is the ultimate stage of the litigation. The real questions now in dispute are first, the proper construction of the language of this codicil of the 15th of March 1878, and second the actual intention which the Maharaja desired to effect in executing it.

The facts so far as material to the decision of these questions are as follows. The Plaintiff is the first-born son of his father, and the 2, 3, and 4 Defendants are his brothers, sons of Jang Bahadur Singh by the Mahomedan woman already mentioned. It has been found as a fact by both the Courts before which this case has come, that no ceremony of marriage was ever gone through between Jang Bahadur Singh and this woman, that she was his mistress not his wife, and that, consequently, the Plaintiff and his brothers are illegitimate. The appellant accepts this finding as conclusive on this point. The first Defendant is the son of Jang Bahadur by a Hindu lady of the Chhattri caste with whom he had, admittedly, gone through the ceremony of marriage according to the strict Hindu rite.

The validity of this marriage is impeached by the Plaintiff upon the ground that at the time it was celebrated Jang Bahadur

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was neither a Hindu nor a member of the Chhattri caste, and that consequently the first Defendant is, like the Plaintiff and his brothers, illegitimate. The issue thus raised necessitated a somewhat lengthy examination of the life history of Jang Bahadur. He was, as already mentioned, the son, born in the year 1846, of a rather distinguished man, a Hindu by religion of the Junwar Chhattri caste, Sir Drigbijai Singh, Maharaja of Balrampur, by a Mahomedan mistress named Imam Bandi, and was therefore, as held by both the Courts above-mentioned, a Mahomedan by birth. This decision is also accepted by the Appellant.

The Subordinate Judge, at page 945 of the Record, finds "that Jang Bahadur was brought up, not as a Mahomedan under "the influence of his Mahomedan mother, but by his Hindu "father in the religion of Hindus" "That (page 956) "he never professed the Mahomedan religion and was never a "Mahomedan in fact; that *after he was able to make a choice* "he did not choose the religion of Islam, but on the other hand "lived and died in the faith of Hinduism....that he was through- "out his life a follower of the popular idolatrous form of "Hinduism, a form directly antagonistic to the cardinal prin- "ciples upon which the religion of Islam is founded," "and he "(the Judge) came to the conclusion that as Jang Bahadur was "never throughout his life a Mahomedan, the Mahomedan law did "not regulate the succession to his estate, and as he was not "a Hindu by birth neither did the Hindu law regulate it; that "(page 959) neither of these laws nor yet the Indian Succession "Act governed him at his death, and that according to the prin- "ciples of justice, equity, and good conscience, and by the appli- "cation of so much of the Hindu law as was applicable to the "case, Ganga Basksh Singh, the first Defendant, was his father's "legitimate son and sole heir."

The Court of the Judicial Commissioner, whilst abstaining from pronouncing any definite opinion on the legitimacy of the first Defendant, gave in the following passage of their judgment a sketch of the status, life, and character of Jang Bahadur Singh, which, though it differs to some extent from that of the Subordinate Judge, is, in their Lordships' view of the evidence, fairly accurate. It runs thus:

"Jang Bahadur belonged to no caste, and even if the issue of his marriage with "Hansraj Kunwar should be held to be legitimate, a point on which I express no "opinion, it is clear that the Hindu community at Balrampur treated the validity

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"of the marriage as open to question. The Subordinate Judge has cited several authorities to show that the Hindu religion admits proselytes of all kinds. The truth of "this is indisputable, but it is equally true that the admission of a proselyte and his "descendants into the society of orthodox Hindus is a very slow process. The "Defendant's witnesses hit off the position exactly when they say that they might "eat with Jang Bahadur's family if they persevered in their Hindu habits "and maintained their character for several generations (*see* the evidence of Defendant's witnesses Nos. 9 and 10). In two parts of one and the same house Jang "Bahadur had a Mahomedan and a Hindu family and seems to have been on "equally affectionate terms with both. He ate food in English Hotels and Railway "Refreshment Rooms, drank gin and kept fowls and pigs. It is evident that he "was neither an orthodox Hindu nor an orthodox Mahomedan. It appears to be "that he led a double life as was almost inevitable under the circumstances. He "no doubt called himself a Hindu, and if he had any religion it was, as the Subordinate Judge says, the popular idolatrous form of Hinduism, but he is not proved "to have been an orthodox Hindu and therefore it seems to me that if the Plaintiff "were found to be of legitimate birth the circumstance that his father became a "Hindu to the extent shown by the evidence would be no reason for passing over "the Plaintiff and giving the property to the first Defendant."

It has been urged on behalf of the Respondents that the Court of the Judicial Commissioner was mistaken on supposing that Jang Bahadur kept his two families in two sides of the same house, that, in truth and fact, he kept them in two different houses. This is really a small matter and does not affect the general accuracy of the passage.

A vast body of evidence was given describing in great detail the participation of Jang Bahadur Singh on many occasions in the most solemn rites and ceremonies of the Hindu religion. It was proved by many witnesses that he wore, somewhat ostentatiously, the Hindu tilak on his forehead, that he was invested by his father with the sacred thread, that he kept a Hindu cook to cook his food, &c. The fair result of the evidence in their Lordships' opinion is that Jang Bahadur did his utmost to become an orthodox Hindu, and to pass as such in the society in which he lived. That his father, from the boy's youth upwards, aided and encouraged him in those efforts; and, finally, when he was only 15 years of age, procured a marriage to be celebrated with great pomp and rejoicing according to the strict Hindu rite between him and the already mentioned Hindu lady of the Chhattri caste, Hansraj Kunwar.

This lady's family were apparently not well off, and it was stated in evidence that the Maharajah gave to her brother Sheo Dial a village to induce him to consent to the union. This, however, only proves the anxiety of the Maharajah to bring

about the marriage. No doubt the Maharajah did not attend the ceremony himself. He allowed certain priests to perform for him those ceremonies properly performable on such occasions by a father, but the marriage cannot but be regarded as a somewhat bold attempt to force, as far as possible, the son's entrance into the ranks of a high (twice born) caste, and it might well be that the father, as the Subordinate Judge thought, may have absented himself from the ceremony from motives of prudence. On the other hand it is difficult to believe that all the parties concerned, Sheo Dial, with his own sons, and his daughters to get married, the Maharajah with his position and distinction, the priests with their duties to their religion and office, and all those who assisted at the ceremony with their notions of what was due to their creed, would have promoted, or taken part in an elaborate public function if they knew that it could at best create only a relation of permanent concubinage, without hope or prospect of elevation into a worthier and more respected state. The evidence of Sheo Dial is important in this connection. He said he went with two Pandits to visit the Maharajah, that he had learned that Jang Bahadur was a Mahomedan woman's son, that on his expressing his scruples about the contemplated marriage owing to this fact the Maharajah assured him that Jang Bahadur was a Hindu; that he (the Maharajah) held him (Sheo Dial) by the arm and said: "From childhood I "have got him suckled by a Brahmin woman. He eats with "me. He does puja, and his ways are the ways of a Hindu." Sheo Dial further says that Jang Bahadur Singh wore a tilak of chandan, that his cook was a Hindu, that he saw him sitting near the Maharajah at dinner, and that hearing and seeing this he, Sheo Dial, consented to the marriage of his sister with Jang Bahadur. No doubt it is stated by another witness that the Maharajah did not sit at meals with this son, but unless this evidence of Sheo Dial be an entire fabrication it bears additional testimony to the anxiety of the Maharajah to have his son accepted and treated as a Hindu. Hansraj Kunwar died in the Maharajah's lifetime. Jang Bahadur performed all the obsequies proper to be performed according to the Hindu religion by a surviving Hindu husband. His father, in the year 1872, got him, then about 24 years of age, again married to another Hindu lady, a member of the same Chhattri caste, Raj Kali Kunwar, who

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survived him, and is the fifth Defendant in this suit. There was the same publicity and pomp as on the occasion of the first marriage, the same religious ceremonial. The Maharajah absented himself on this, as he did on the former occasion, and got his duties performed vicariously in the same way. The sole issue of this second marriage was a girl. Both she and Baiya Ganga Bakhsh Singh married members of the Chhattri caste. Sir Robert Finlay insists that the law for many centuries has been that a Hindu must be born not made, and he cited several authorities in support of that proposition. On the other hand the treatises referred to by the Subordinate Judge at page 889 and the following pages of his judgment appear to tend in an opposite direction, and the facts of this case show that in this matter of marriage the rules both of Hinduism and of caste were not, in this instance at all events, strictly applied. In the view their Lordships take it is unnecessary to express any opinion on the point. The matter for decision in this case being in the construction of a codicil to the Maharajah's will, the point is not what is the strict rule of the Hindu religion, or the strict rule of the Chhattri caste, but this, namely what were the wishes, and intentions of the testator as revealed by the language of that instrument, viewed through the light of the circumstances which surrounded him at the time he made it.

It would be strange indeed if the man who had made it his special care to rear this son of his as a Hindu, and had succeeded in marrying him to two high caste Hindu women, should intend or desire, whatever might be the strict letter of the law, to place the offspring of these unions on the same level as the illegitimate children of his son's Mahomedan mistress and make them all equally the objects of his bounty.

Much reliance was placed by the Appellants upon the evidence of several witnesses, members of the Chhattri caste, which was directed to show that they would not eat with Jang Bahadur Singh, take betel leaves from him, or recognise him as a member of that caste, or of the Hindu religion, and it was contended that the Subordinate Judge had not paid sufficient attention to this evidence, or given it its due weight. He has no doubt not commented upon it at any great length, but it would be quite unreasonable because of this to conclude that he had not fully considered it. When the evidence is examined it will be found

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that the objection of many, if not most of these witnesses, to eat with Jang Bahadur or to give him betel leaves, &c., was due to the well-known and undisputed fact that he was the illegitimate son of a Mahomedan mistress, rather than to the fact that he was not a genuine Hindu. This is notably so in the case of the witnesses Kali Parshad, page, 723, and Jagdeo Singh, page 726. The former said, "I did not eat with Jang Bahadur because he was "Imam Bandi's son," and again, "I won't eat kutcha food touched "by Ganga Baskhsh. I won't drink water from his hand because "his grandmother was a Mahomedan," and the latter said "I "cannot eat food cooked by Raj Kali Kunwar because she was "Jang Bahadur's wife," but he proceeded to say that he would have no objection to eat with Jang Bahadur Singh if the Maharaja had asked him to do so, and then he added the important statement: "Jang Bahadur had offended the Maharaja by keeping a "Mahomedan woman, that woman had four sons, she lived with "Bandi as Jang Bahadur's mistress for 12 or 13 years until her "death." Babu Basudeo Lal, an educated man and an advocate, at page, 731 says "Jang Bahadur took particular care to put on "the tilak more than a born Hindu would take because he was "anxious to appear a Hindu; that from the orthodox point of "view he (the witness) did not consider him a Hindu, but he "could not say he was a Mahomedan, because he professed to be "a Hindu," yet he gave not this fact but the fact that Jang Bahadur was of illegitimate birth as the reason for his unwillingness to take water from his hands.

Hanwant Singh (page 727) gives remarkable evidence to the same effect. He said: "I consider Jang Bahadur a Hindu. He "worshipped like a Hindu. He did pilgrimages like a Hindu. "He gave dans to Brahmins like a Hindu. His ways were those "of Hindu. I saw him doing puja in the temple for the first "time years ago, and three times altogether I saw him feeding "Brahmins at the temple." Yet despite what he saw, and his opinions on Jang Bahadur's religion, he says on the next page he would not eat with him because he was born of Imam Bandi, nor would he eat with Ganga Baksh, because presumably he was his father's son, though he admits that if the latter "persevered in his Hindu habits for two generations, he would be taken "into the ***biradri***."

These witnesses are fair specimens of those examined on this point. Their evidence might be of importance if it was necessary

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for their Lordships to determine whether or not the Defendant No. 1 was the legitimate son and heir-at-law of Jang Bahadur. The Subordinate Judge has (at page 961) determined that question in the affirmative. Their Lordships concur with the Court of the Judicial Commissioner in thinking that it is not necessary to determine it one way or the other for the purposes of the decision of this Appeal, and they therefore abstain from expressing any opinion upon it. What is of importance, when one has to construe this codicil, and determine what was the testator's intention on making it, is to ascertain in what light he regarded his son, the marriages he helped that son to contract, and the issue that sprung from them.

Their Lordships are of opinion that the reasonable conclusion to be drawn from the evidence is that the Maharajah treated this son of his as a Hindu in religion, aud desired that others should so treat him, that he treated his marriages with the two Chhattri ladies as lawful marriages and desired that others should so treat them, and consequently resolved to regard and treat the offspring of these unions as legitimate, and desired they should be so treated and regarded by others; and that it was in this frame of mind he made the testamentary disposition which is in dispute. It is lengthy, and in its material parts runs thus :—

"Whereas I have a son, named Jang Bahadur Singh, born of an unmarried *Mahal*, and whereas he is not born of *Khas Mahal*, and it is against the usage of "the family and against religion according to the Hindu Shastras, so he is not "considered capable of *gaddinashini* and the proprietorship of the *riasat*. But he "also being born of my loins, it is incumbent on me that such means be provided "for support as would enable him and his (aulad) issues to support themselves well "and with respect. Accordingly ever since the date of his birth till this day "whenever proper opportunity presented. grant was made for his support; and "during my life-time I shall make grants according to my will whenever I shall "deem it expedient to do so. But with a view to clearly make a provision before-"hand in order that there may not remain any co-ownership and dispute relating "to a part or the whole of my moveable and immoveable property, a property "should be determined for Jang Bahadur Singh and his (aulad) issues for genera-"tion after generation, in order that the conditions of the deed may remain binding "in perpetuity. Accordingly the settlement is made as follows. It is this : Rs. 4,000 "per mensem or Rs 48,000 per annum shall be continued to be paid by the pro-"prietor of the *riasat*, the *locum tenens* of the *gaddinashin* for the time being; and "that amount shall be paid to Jang Bahadur Singh and his (aulad) issues for "generation after generation as long as the (Khandan) family of Jang Bahadur "Singh and his (aulad) issues remain in existence."

"DETAILS OF CONDITIONS.

"1. He shall not directly or indirectly take part in running the *riasat* and "shall also remain a well wisher of the *riasat*.

"2. He shall not transfer his maintenance allowance to a stranger by sale, "mortgage or otherwise.

"3. For his lifetime Jang Bahadur Singh has a right to spend this money, "but after his death from among his (aulad) issues one person, (jis Ko haq pahun-"chta ho) to whom the right may go shall be considered proprietor of this main-"tenance allowance without division as a *rais*. The other issues of the family of Jang "Bahadur Singh shall be entitled to get food, raiment and other necessaries out of "the monthly allowance,

"4. When there remains no descendant of the family of Jang Bahadur Singh, "at any time, the monthly allowance of Rs. 4,000 will be resumed and remain in "proprietary possession of the proprietor of the *raisat* the *gaddinashin*.

"5. For the realisation of the monthly allowance, a few villages with *Jama* "and names of demarcated villages and hamlets are selected, and a list of the "same is annexed to the document. The *jama* of the selected (*tajwiz-shuda*) "villages will be credited from year to year towards the aforesaid fixed monthly "allowance of Rs. 4,000. Neither has the proprietor of the *raisat*, *gaddi-nashin*, "power to realise the *jama* of the selected villages yielding Rs. 48,000, including "*mal* and *sewai*, from Jang Bahadur Singh or his descendants, nor is Jang Bhadur "Singh or his family descendants competent to demand the fixed monthly "allowance of Rs. 4,000 from the *gaddinashin*, the proprietor of the *raisat*.

"6. The *jama* of the selected villages, a copy of which is attached to the "document, shall be deemed the *jama*, including *mal* and *sewai* in perpetuity. "And the proprietor of the *raisat* for the time being shall have no power to in-"crease or decrease the *jama* And Jang Bahadur Singh and his family descen-"dants shall raise no excuse as to increase or decrease of the *jama*. And the "proprietor of the *raisat* shall have no power to cancel the lease. And Jang "Bahadur Singh and his family descendants shall have no proprietary right "against the proprietor of the *raisat*, except that of deriving benefit from the "selected villages. Besides, Jang Bahadur Singh and his family descendants shall "have no power to transfer the immovable property by sale or mortgage or "otherwise. But they shall continue in perpetuity to hold possession over the "said villages.

"7. The villages selected for payment of the monthly allowance shall have "their boundaries maintained according to the map of *had-o-bast kishtwar*. The "proprietor of the *raisat* shall have no power to vary them contrary to it, nor shall "Jang Bahdur Singh or his descendants have any."

Then follow the details of the villages leased out in perpetuity for the payment of the monthly allowance of Rs. 4, 000. The testator then makes a bequest to Imam Bandi, the mother of Jang Bahadur, in the following words:—

"Besides, with a view to support the mother of Jang Bahadur Singh, I propose "to fix Rs. 1,000 per mensem, or Rs. 12,000 a year for her personal expenses. "She that is the mother of Jang Bahadur Singh has power to spend the fixed al-"lowance without interference by anybody else, and may, in her lifetime, make a "will in favour of anybody whom she pleases, and in respect of any good work she "likes, and it will be deemed liable to be acted upon. And for the purpose of realising "the aforesaid annuity of Rs. 12,000, a few villages, mentioned below, are given by "way of *theka* with *jama* assessed thereon The money will be realised from those "villages from year to year."

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He then gives a list of the villages out of which the Rs. 12,000 was to be collected, and proceeds to add:—

"These few sentences have been put down to make provision for her support "while in the enjoyment of health and possession of the five senses, and out of my "own pleasure and accord, in order that they may be of use after me."

The testator died on the 27th of May 1882. In or about January 1894 Jang Bahadur Singh became insane. He so continued for several years, and died on the 1st of October 1899 leaving as his own the moveable and immoveable property mentioned in Schedules B. and C. attached to the Statement of Claim. The first Defendant, as already mentioned, immediately went into possession of the property mentioned in Schedule A. and has since retained it.

Jang Bahadur Singh was created by the codicil ancestor or first proprietor of the estate, maintenance allowances somewhat resembling rentcharges, were charged upon it. It was to be perpetual, impartible, indivisible, and incapable of being otherwise charged or encumbered, and it was not to be the subject of any co-ownership. On the death of Jang Bahadur a person, styled at page 224 the representative of the former, was to succeed him as proprietor of this maintenance allowance,. without "division" as a rais. "This proprietor was to be one of the issue of "Bahadur Singh." The other issue (aulad) of the family (khandan) of Jang Bahadur Singh being only entitled to get food and raiment out of the allowance. In addition the marriage and funeral expenses of the male and female children of the family of Jang Bhdahur Singh were to be paid. The only indication given as to how the particular individual one of the issue of Jang Bahadur, who was to succeed him as proprietor of the allowance was to be ascertained is that contained in the words "on whom the right may "devolve." The testator must have had in mind some law or rule which would apply to fix the succession. What law could this high caste Hindu possibly have had in mind for such a purpose other than the Hindu law? That law, however, in the matter of succession to property, takes no account, in the three higher classes, of illegitimate descendants. Sir Robert Finlay, as their Lordships understood, admitted this contention—at least to this extent, that if when a successor came to be ascertained the class of beneficiaries contained both legitimate and illegitimate members, the eldest legitimate male would by

the Hindu law succeed; but where, as in the present case, as he contended, all the children were illegitimate, the eldest male amongst them should succeed. But by what law or rule he did not indicate. It is difficult to suppose that if the testator intended all his grandchildren to be put upon the same level he would not have indicated some method by which the successor to his son should be selected. If he relied at all upon the Hindu law to select that successor it could only be because he wished it to be assumed that that law applied to some of the issue of his son, and that could only be the case if those members of the issue were to be taken to be legitimate.

At the date of this codicil Jang Bahadur was only about 30 years of age. He had already had one son by his deceased Chhattri wife. He had been married for some time to another Chhattri wife, by whom it was quite possible he might have had male issue, and it would have been quite in conflict with the whole tenor of the Maharaja's treatment of and conduct towards his son Jang Bahadur, to deprive by this codicil these marriages and the issue springing from them of the character and status he had striven to secure for them. The Court of the Judicial Commissioner came to the conclusion that the Maharajah thought these marriages of his son were valid, and the issue of them legitimate. However that may be, it is clear their Lordships think upon the whole of the evidence that he wished them to be so regarded by others. Nothing would more surely have defeated that desire—than that he should by this testamentary instrument show that he himself regarded them in a wholly different light, and placed the children of these marriages on an equality with those of a Mahomedan concubine. The Maharajah has used the word "*aulad*" throughout this codicil to describe the issue of his son Jang Bhadur. The Court of the Judicial Commissioner has laid it down that this word *prima facie* means legitimate issue. This case is not one where a gift is made by will of the corpus of a fund, or a life interest in a fund to the "children" of the testator or of another as a class. There may be good reason in some such cases for holding that in India the word "children" includes illegitimate children, but here a succession of life interests from generation to generation is intended to be set up, the successor or "proprietor" in each instance being vested with absolute control of the income, subject only to the duty of maintaining the issue

(aulad) of the family (khandan) of the first proprietor, Jang Badadur Singh. There is nothing on the face of the will to suggest that a meaning should be given to the word "aulad" different from its *prima facie* meaning; but if it is to be read as including illegitimate issue, then it follows that the testator intended to bring into the line of succession not only his illegitimate grandchildren but their illegitimate issue from generation to generation. Such a construction would render rather unnecessary the provision (No. 4, page 224) that if no descendants of the family of Jang Bahadur remained, the monthly allowance should fall into the possession of the gaddinashin, and would also seem to defeat the whole purpose and object of the testator in establishing this succession of life interests. Nor do their Lordships see any reason for extending in this instance the meaning of the word "*khandan*," which ordinarily refers to the group of descendants who constitute the family of the progenitor, so as to include illegitimate offspring, who from the necessities of the case cannot share in the family life or its worship or ceremonials.

It has been strenuously urged by Sir Robert Finlay on behalf of the Appellant: firstly, that there would have been nothing easier for the testator, if he desired to exclude his illegitimate grandchildren from all benefit under this codicil than to have said so. The question is, has he not done so by the use of the word aulad. But even if this be not so, it was quite as easy for him to include them in the class described by the word issue as to exclude them from it, so that the argument cuts both ways. And it was in the second place contended that having regard to his interest in these children, he never could have intended to leave them unprovided for. He undoubtedly did show some interest in them, but not a very keen interest, and it is by no means clear that he did not intend them to be provided for in the way they have been, in fact, provided for, namely, by being maintained by their grandmother Imam Bandi during her life, out of the income left to her by the codicil. He enabled her by the exercise of the testamentary power over this income conferred upon her so to provide for them after her death. The income was large, Rs. 1, 000 per mensem. She was a woman who at the date of the codicil must have been at least 45 years of age, her son Jang Bahadur being then 30 years of age. The son's

mistress and her children lived with her. She, according to the evidence, helped to rear them. It was scarcely conceivable that she should require Rs. 12,000 per annum for her personal expenses alone. The power of disposing of this income by will clearly showed that the testator had some object in view beyond providing adequately for her maintenance. What more natural than that this income, handsome in amount, and disposable by her will, should have been given to enable her to provide for her grand-children. Their Lordships are therefore of opinion that having regard to all the evidence in the case and the provisions of the codicil itself, the intention of the testator plainly was to treat the marriages of Jang Bahadur with the two Chhattri women already mentioned as valid marriages, and the issue of those marriages as legitimate issue. They think that the judgment appealed from was right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellant: T. L. Wilson & Co.

Solicitors for Respondents: Sanderson, Adkin, Lee and Eddis,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller, and Mr. Justice Tyabji.

Subramanian Patter Kariakar's son
Sivaram Patter Kariakar ... *Appellant** (*Plaintiff*).

v.

Edathil Madhathil V. Krishna Aiyar (died) and another ... *Respondents* (*Defendant's L. R.*)

Limitation Act (Act IX of 1908) S. 4—Applicability—Suits under S. 77 of Registration Act—Last day holiday—Presentation next office day—General principles—General Clauses Act (Act X of 1897) S. 10—Refusal to register—Executant failing to appear on summons—Order returning document on plaintiff's application to return.

Though the provisions of the Limitation Act are inapplicable to suits provided for by S. 77 of the Registration Act, the general principle recognised in S. 10 of the General Clauses Act, *viz.*, that where a plaintiff cannot owing to the Court being closed present his plaint on a particular day on which it ought to be presented, he should not be allowed to suffer if he presents it at the earliest possible opportunity thereafter, applies to them

Aravamudu Ayyangar v. *Samiyappa Naidu* (1), *Sambasiva Chari* v. *Ramaswami Reddi* (2), *Haji Ismail Sait* v. *Trustees of the Madras Harbour* (3), *Messrs. Arbuthnot and Co.* v. *Sabapathy Mudaliar* (4), refered to.

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* A. S. O. 128 of 1908. — 10th February 1914.

1. (1897) I. L. R. 21 M. 385.
2. (1898) I. L. R. 22 M. 179.
3. (1909) I. L. R. 28 M. 889.
4. (1912) 28 M. L. J. 221.

Sivarama Patter Kariakar v. V. Krishna Aiyar.

Where on the failure of the executant of a deed presented for registration to appear though twice summoned, the plaintiff asked the Sub-Registrar either to register or to return it to him and the Sub-Registrar returned it to the plaintiff.

Held that under the circumstances the Sub-Registrar's order returning the document amounted to a refusal to register.

Appeal from the decree of the Court of the Subordinate Judge of Calicut in O. S. No. 20 of 1907.

O. V. Ananthakrishna Aiyar for Appellant.

T. R. Ramachandra Aiyar for Respondent.

Judgment :—We think this appeal must be allowed. We are bound by the Full Bench decision in *Veeramma* v. *Abbiah* [1] and the decision in *Appa Rau Savayi Aswa Rau* v. *Krishna Murthi* [2] which followed it, to deal with the case on the footing that the provisions of the Limitation Act are inapplicable to the suit provided for by S. 77 of the Registration Act.

But apart from that Act it would be reasonable on general principles to hold that, when the plaintiff cannot, owing to the Court being closed, present his plaint on a particular day, on which it ought to be presented, he should not be allowed to suffer if he presents it at the earliest possible opportunity thereafter. That principle has been recognised by the legislature in S. 10 of the General Clauses Act of 1897 and in this Court in *Aravamudu Aiyangar* v. *Samiyappa Nadan* [3], *Sambasiva Chari* v. *Ramasami Reddi* [4], *Haji Ismail Sait* v. *Trustees of the Harbour Madras* [5], *Messrs. Arbuthnot and Co.* v. *Sabapathy Mudaliar* [6].

Our attention has been drawn to S. 26 of Act III of 1877 as indicating that the legislature intended to exclude the application of this principle; by that section the same principle is expressly applied to the case where the Registration office is not open on the day on which a document ought to be presented for registration, and so, it is contended, is impliedly excluded in all other cases. We are unable to take this view.

It may be correct in many cases but here in the absence of any apparent reason why the person coming to present a document should have the right to await the opening of the office, while a plaintiff coming to the closed court with his plaint should not have the corresponding right, it seems the more reasonable view

1. (1893) I. L. R. 18 M. 99.
2. (1896) I. L. R. 20 M. 249.
3. (1897) I.L.R. 21 M. 885.
4. (1898) I.L R. 22 M. 179.
5. (1900) I.L.R. 23 M. 889.
6. (1912) 23 M.L.J. 221.

Sivarama Patter Kariakar v. V. Krishna Iyer.

that the legislature did not intentionally exclude in the latter case the operation of this generally recognized principle which it recognized in the former case.

In *Appa Rau Sanayi Aswa Rau* v. *Krishna Murthi*[1] and *Veeramma* v. ***Abbiah*** [2], the effect of this principle was not in question as apart from its enunciation in S. 5 of the Limitation Act, and we may follow the other cases, to which we have referred, and hold that it is applicable to a suit under S. 77 of the Registration Act.

The suit was therefore not barred by limitation.

On the remaining question we think the Sub-Registrar did refuse registration. The executant, after being twice summoned failed to appear and on the authorities the Sub-Registrar should have made an order refusing registration on the footing of denial of execution. The plaintiff in Exhibit I pointed out the executant's failure to appear and asked that the Sub-Registrar should register the instrument or return it to him (the plaintiff).

We read this prayer as the Subordinate Judge reads it that is, as a prayer to register, or if that cannot be done, then to return the document.

The Sub-Registrar returned the document and endorsed it as " returned in accordance with the request of the party presenting it." He also in a subsequent notice to the plaintiff described it as a document of which registration was refused (Exhibit E). In these circumstances we think the Sub-Registrar's order returning the document was really an order consequential on a refusal to register it, though he did not make the written order with reasons for refusal as required by the law. The request of the plaintiff was to return the document if it could not be registered and by the order of the Sub-Registrar it was returned ***as requested.***

We think there was in fact a refusal to register and that the endorsement was intended to be consequent on the refusal and so may be taken to be an order refusing to register.

The decree of the Subordinate Judge must in these circumstances be reversed and the suit remanded for disposal according to law.

Costs will abide the result.

1. (1896) I. L. R. 20 M. 249. 2. (1893) I. L. R 18 M. 99.

Vijiaraghavalu, In re.

Bakewell J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—The Honourable Mr. Justice Bakewell.

In the matter of M. Vijiaraghavalu Pillai, and In the matter of the Madras City Municipal Act, III of 1904, and of the Specific Relief Act, 1877.

Specific Relief Act, S. 45—Mandamus—Act or forbearance and person to be clearly stated—Madras Municipal Act, Ss. 88, 52, Rules under S. 418—Objection to qualification for election as Commissioner—Revision before Presidency Magistrate—Decision upholding objection—Name not directed to be removed—Application for continuance of name on the list—Mandamus—Consideration of irrelevant matters—not acting out-side office—Remedy under Criminal Procedure Code.

An application under S. 45 of the Specific Relief Act should clearly state the act or forbearance to be directed and the individual against whom the order should be made.

Where, on objection taken to the inclusion of the applicant's name in the list of candidates qualified for election as Municipal Commissioners, the Presidency Magistrate before whom the matter went on revision from the order of the President, merely decided that the applicant was not qualified for election but no direction was given either by the Magistrate or by the President to remove his name from the list.

Held. that an application under the section for an order that his name should continue on the list could not be granted.

If the Magistrate considers irrelevant matters that is not acting outside his office and his order must be sought to be reviewed under the Criminal Procedure Code.

S. Srinivasa Iyengar (with him *T. Ethirajalu Mudaliar*) for Appellant.

K. Srinivasa Iyengar for Petitioner, Respondent.

Judgment :—The name of the appellant has under Sec. 46 of the Madras City Municipal Act, 1904, been entered in the list of persons qualified for election as a Commissioner for one of the divisions of the City of Madras ; and under Sec. 52, the list is conclusive as to his qualifications to be elected, subject to certain procedure for its amendment.

This applicant has been nominated as a candidate for election, and his name has been published in the list of candidates. Objection was made to the inclusion of the applicant's name in this list, and was rejected by the President of the Corporation, under Clause 5 of the rules framed by the Local Government by virtue of Section 413 of the Act. Under the same clause, a petition for revision of the President's decision may be presented to the Presidency Magistrate, whose decision is to be final, and one Appaswami Pillai, an elector, presented a petition. It is alleged that upon hearing this petition, the Magistrate considered an objection to the inclusion of the applicant's name in the list of

* 6th February 1914.

persons qualified for election, and that this objection was irrelevant to the inquiry before him, which should have been confined to objection to the preparation of the list of nomination. The Magistrate allowed the objection and decided that the applicant was not qualified for election as a Commissioner under S. 33 of the Act, which prescribes the necessary qualifications. He does not appear to have directed the applicant's name to be struck off the list, or indeed to have passed any order with reference thereto, but to have contented himself with a mere declaration of opinion as to the applicant's qualifications.

The present application which is based on S. 45 of the Specific Relief Act, 1877, prays for an order that the name of the applicant do continue to remain in the list of persons qualified for election as Municipal Commissioners for the City of Madras notwithstanding the order of the Magistrate. Section 45 of that Act empowers the High Court to make an order requiring a Specific Act to be done or forborne by a person holding a public office or by any Corporation or inferior Court.

The application does not specify the person or Court who should be ordered to act or forbear, and it is not clear with what irregular act or forbearance he is threatened. The application does not relate to the list of candidates for election, but to the list under section 33, as to which it is not alleged that any action is threatened either by the President of the Corporation or the Magistrate. The Magistrate has not directed the list of candidates to be amended, and it does not appear that the President has taken or threatened to take, any step affecting that list.

An application for mandamus such as this virtually is, should point out clearly the Specific Act or forbearance and the individual, against whom it is directed, and this the applicant has failed to do.

Assuming that the applicant's contention be correct, and that the Magistrate has considered irrelevant matters, it cannot be said that he has acted outside his office or that there is any other reason why his procedure should not be reviewed by the Court in accordance with the provisions of the Procedure Code. (See Specific Relief Act, Section 45 (*d*).

The application is dismissed with taxed costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Oldfield.

Athalur Malakondiah *Appellant.**

v.

Thatha Lakshminarasimhalu Chetty *Respondent.*

Athalur Malakondiah v. Lakshmi-narasimhalu Chetty.

White, C. J.

Practice—Administration suit by legatee and annuitant—Discretion of Court—Administration decree not obligatory—on deposit of legacy amount etc. action may be dismissed—Creditor's action and legatee's action—No difference between.

It is not obligatory on the Court to pass an administration decree in a suit by a legatee and annuitant where the defendant (executor) deposits the amount of the legacy and a sum sufficient to secure the payment of the annuity.

Upon the executor depositing the amount, the Court may dismiss the suit' making such order as to costs as in its discretion it deems fit.

No distinction can be drawn between suits by creditors and suits by legatees

Practice of English Courts followed.

On Appeal from the decree of Hon'ble Mr. Justice Bakewell, dated the 19th day of December 1912 in the Ordinary Original Civil jurisdiction of the High Court.

V. V. Srinivasa Iyengar for Appellants.

V. Raghunatha Sastriar and *C. P. Ramasamy Iyer* for Respondents.

The Court delivered the following

Judgment.—*The Chief Justice*:—This is an appeal from a decree dismissing a suit brought by a party who was a legatee and annuitant under the will of a deceased person of which the defendant was the executor. It is contended on behalf of the appellant that it was obligatory on the learned Judge to proceed with the case and to hear the evidence and that the plaintiff if the allegations in the plaint were established, was entitled to claim, as of right, a general administration decree. A written statement was put in and, after the written statement, the defendant paid into court the amount of the legacy and a sum sufficient to secure the payment of the annuity. I think the learned Judge had a discretion to adopt the course which he took. See Halsbury's Laws of England Vol. XIV, paragraph 798 and the cases which are there cited. No doubt the cases cited are instances where the Court has acted

* O. S. A. No. 18 of 1913. 9th February 1914.

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under Order 55, Rule 10 of the Rules of the Supreme Court of England. But with the exception of one case we have not been referred to any authorities which show that any alteration of the substantive rights of parties either in law or in equity was affected by the rule in question, a rule which enabled a party to apply for the administration of the estate of a deceased person by originating summons instead by the suit. It seems to me if the rule purported to affect the substantive rights of parties, it would be beyond the power of the rule-making authority. In view of the pleadings in this case and having regard to the payment into Court to which I have referred, I am not prepared to say that the learned Judge exercised a discretion, which I think he had, wrongly when he dismissed the suit. We have been referred by the learned vakil for the appellant to the case of *Wollaston* v. *Wollaston.*[1] There the question before the Court was whether the annuitant under the will in question was entitled to have a judgment for administration of the estate and it was held that he was. The argument turned on whether the annuitant qua annuitant was entitled to a judgment for administration.

It seems clear that under the English pratice where one creditor sues on behalf of others for the administration of the estate of a deceased person the defendant may at any time before judgment have the action dismissed on payment of the plaintiff's debts and all the costs of the action. See Daniel's Chancery Practice, edition 7, Vol. I, page 195 and the cases there cited. It has been pointed out that that was a case of a creditor's suit and the case now before us is a suit by a legatee and annuitant. But for the purposes of the question whether there is a discretion in the learned Judge I do not think any distinction can be drawn between suits by creditors and suits by legatees. As has been pointed out in the course of argument, in view of the payment into Court which has been made, the only question that would remain, if we follow the English practice, would be the question of costs. Our attention has been called to a case which, Mr. Srinivasa Aiyanger contended, showed that there was no discretion in the court. He contended that the discretion, in England at any rate was given by Order 55, Rule 10 and that prior to the introduction of that rule there was a

1. (1877) 7 Ch. D. 58.

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discretion. The case to which he referred is *Campbell* v. *Gillespie*[1]. That was a case in which a creditor sued the trustee under a deed for the benefit of creditors charging him with fraud and misconduct and claiming an account of all his dealings under the trust deed. No doubt the learned Judge in that case observed that under the old law the plaintiff would have been entitled as a matter of right, to a common account against the defendant but under Order 55, Rule 10 the Court had a discretion. I do not think the observations of the learned Judge, with reference to the particular facts of this case require us to hold that in a case like the present there is no discretion in the Court. In regard to costs the order dismissing the suit on the pleadings was an order made by the learned Judge in the exercise of a discretion which I think he was entitled to exercise. This being so, I do not think his order as to costs should be disturbed.

The appeal fails and is dismissed with costs.

Oldfield, J:—I agree.

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1. (1900) 1 Ch. 225.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Sundarambal Ammal and Kamalambal Ammal. *Petitioners* Appellants* in S. A. No. 1333 of 1912.

Yogavanagurukkal *Respondent* (*Defendant.*)

Civil Procedure Code, Order 23, r. 3—Compromise—Hindu Law—Religious office—Right of succession to—Archaka—Right of females to inherit or hold office—Permanent disqualification to perform office—Disqualification to hold office and enjoy emoluments—Trusteeship and Archakaship, defendant petitioner—Alienation, for consideration—Custom—Illegality of—Judgment by consent in respect of religious office—Not binding against public—Undue influence—Low price, not ground for finding—Intention of founder—Criterion for determining.

Where under a compromise, the defendant who had obtained a decree in his favour agreed for a pecuniary consideration to part with a portion of his right to the Archaka miras in a temple in favour of the plaintiffs (females) *Held* that the compromise being opposed to public policy could not be given effect to under O. 23, R 3 C. P. C.

Per Sadasiva Aiyar, J:—The alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld even if custom sanctions it, such custom being opposed to public policy.

Permanent disqualification to perform the duties of an office is also a disqualification to hold the office and enjoy its emoluments whether the disqualification is by reason of change of faith, disease, or of sex.

Females being by reason of their sex disqualified from performing the duties of the Archaka office in a Saivite temple, are also disqualified from inheriting the office and enjoying its emoluments.

In the case of religious offices, duties form the substance, rights being only appurtenant to the duties.

In the case of trusteeship, which does not involve duties which females are incapacitated from performing, sex may not be a disqualification to inherit the office.

Mallikarjuna v. *Sridevamma* (1) *Dhuncoover Bai* v. *The Advocate General* (2) *Radhamohun Mundal* v. *Jadoomani Dasi* (3) referred to.

The proper performance of duties attached to a religious office being a matter which affects the public, judgment by consent with respect to the right to hold such office will not bind the public.

The fact that a man is obliged to part with his property for what he considers an unduly low price owing to pressing necessities is not a ground for holding that the contract is vitiated by undue influence.

Per Tyabji, J:—The question whether sex is a disqualification to inherit must be decided with reference to the particular facts of each case, the nature of the functions to be performed by the office-holder, the amount of remuneration, whether it leaves a surplus, or not, and other similar matters.

* C. M. P. No. 924 of 1913. 28th January 1914.

1 (1897) I. L. R. 20 M. 162 S. C. 7 M. L. J. 289. 2 (1899) 1 Bom. L. R. 743.
3 (1875) 23 W. R. 369.

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In determining the rule of succession to a religious office, the first matter to which attention is to be directed is in what method did the founder of the institution desire that succession to the office should devolve. The desires of the founder must be given effect to unless they are opposed to public policy or to the fulfilment of the general objects of the institution.

In the absence of a written instrument containing a record of the founder's intentions, the course of practice in the past furnishes the rule as giving indications of the same and may be supplemented by general law and also by a consideration of the customs and usages prevailing in similar institutions in the same locality.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to pass a decree in terms of the Razinama Petition in S. A. No. 1333 of 1912, preferred to the High Court against the decree of the District Court of Trichinopoly in A. S. No. 53 of 1911 (O. S. No. 39 of 1910 on the file of the Court of the District Munsif of Trichinopoly).

M. B. Dorasami Iyengar for Appellant.

S. T. Srinivasa Gopala Chari for Respondent.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*—This is a petition put in by the plaintiffs, appellants in the Second Appeal No. 1333 of 1912 praying for the passing of a decree in accordance with the terms of a compromise signed by the two plaintiffs and by the 1st defendant. The first defendant though he has signed the compromise petition, opposed the application on the grounds (*a*) that he was induced to sign the compromise through undue influence exerted on him by the 2nd plaintiff's husband, (*b*) that the agreement was not the result of a *bona fide* compromise of doubtful claims but was really a sale of a portion of the 1st defendant's rights for a very low consideration and that the sale was also invalid for want of proper consideration and (*c*) that the compromise is further illegal as it is really an alienation of a religious office to persons legally incompetent to hold the office (see 17th para of the 1st defendant's affidavit, dated 2nd October 1913.)

Having considered the affidavits on both sides, I don't think that there is any force in the objections (*a*) and (*b*). No doubt it appears that the 1st defendant was in great pecuniary difficulties when he entered into the compromise, having been arrested by a decree-holder for a debt and having even been obliged to put in an insolvent petition. But the fact that a man is

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obliged to part with his properties for what he considers an unduly low price owing to his pressing necessities, is not a ground for holding that the contract by which he parts with his rights is affected by undue influence. Under S. 16 Clause 2 of the Contract Act, unless the Ist defendant shows, that his mental capacity was temporarily affected by mental distress or that the 2nd plaintiff's husband stood in a fiduciary relation to the 1st defendant or held a real or apparent authority over him, he (the 1st defendant) cannot get rid of the bargain which he entered into by this agreement or compromise petition.

The really important objection therefore is the third objection namely, that the compromise is in the nature of an alienation of a relgious office and is unlawful and that it cannot therefore be accepted by the Court under Order 23, Rule 3, which provides that it is only when a suit is adjusted by a lawful agreement or compromise that the Court can order such a compromise to be recorded and can pass a decree in accordance therewith. There is also another objection, or rather another aspect of the same objection, argued before us namely, that a dispute relating to a religious office cannot be lawfully compromised at all between the parties to the litigation in which the right to the religious office was submitted for the adjudication of the Court. The replies to these contentions by the appellants' learned vakil may be summarised thus:—(*a*) the compromise agreement is not in the nature of an alienation of a religious office, but it was a real compromise of a doubtful claim and it merely admits the right of the plaintiffs to a portion of the claim put forward by them in the suit; (*b*) there is no illegality in compromising the claim to a religious office under litigation, the office being in the nature of a private civil right; (*c*) even if it is not wholly in the nature of private civil right, still there is no illegality in the compromise of such a claim under litigation.

As regards the first question, I have read the Razinama carefully and I feel very little doubt the 1st defendant, for some consideration, really parted by way of alienation, with a portion of his title to the office of archaka in certain temples. Though the Razinamah begins by saying that the parties in consideration of the costs, losses and worry likely to occur to both of them in the prosecution of this second appeal have made "the undermentioned arrangements", it proceeds to say that the plaintiffs

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(appellants) have consented to discharge the 1st defendant's portion of a common debt and that that is also one of the considerations which led to the compromise. It further appears from the affidavits on both sides that the signing of the compromise petition by the plaintiffs and the 1st defendant in March 1913 was the result of a more comprehensive agreement which had been effected by the 2nd plaintiff's husband acting on behalf of the plaintiffs in February 1913. In fact, the document of February 1913 marked as Ex. A and attached to the affidavit of the 1st defendant clearly shows that the 1st defendant (*a*) agreed to part with a portion of his rights to the pujah right declared in his favour by the decrees of the Lower Courts in favour of the plaintiffs and (*b*) further agreed to sell the remaining portion of his rights to the 2nd plaintiff's husband, both agreements being a part of a single transaction in consideration of a sum of Rs. 2500 promised by the 2nd plaintiff's husband.

These promises therefore are clearly in the nature of alienations of rights for a single consideration and neither of them is strictly a compromise of a doubtful claim.

The claim in dispute in this suit is one half share of the pujah miras in the Rock Fort Temple, Trichinopoly. Now this pujah miras involves the duty of the touching, the bathing, and the adorning &c., of certain idols in the Rock Fort Temple, the making of offerings to the idols, the reciting of mantrams and the doing of other similar services. These duties form part of the daily temple services and there are other similar services to be performed on occasions of festivals. For the performance of these services, certain emoluments in the shape of fees are given out of the temple funds &c.,............The Pujah office, is hereditary, *i.e.*, it descends in the line of heirs according to the Hindu Law, but it is admitted that if the next heir under the Hindu Law is a female, she is incapacitated by her sex from performing personally the duties of the office which, as I said before, include the touching of the idols and the recital of the mantrams personally. That is, she cannot do the duties of the office personally and cannot hold the office personally. I might at once say that in respect of such a religious office, it is not the right of the office-holder to receive emoluments which is the important or principal right but in my opinion it is the right of the deity to have certain services performed to it

which is the primary right I also think that as regards the religious office itself, the duties of the office should be considered as the substance of the office, the right to receive the emolument. being only an appurtenance of the said duties. Even as regards a secular office, say the office of a clerk in a private Bank, when we think of the office, we have more in view the duties of the said clerk than the emoluments which the clerk is entitled to get from his employer. Of course, in the case of a hereditary office, the idea of "right" comes a little more into prominence than the idea of the duties attached to the office, but even in such cases, I am inclined to hold that it is the rights that are subordinate and appurtenant to the duties and it is not the duties that are subordinate and appurtenant to the rights. That even a religious office can be held by a right of heredity, has now been too well established to be put in question again, though I have in a recent case *Phatma Bi* v. *Haji Abdulla Musa Sait* [1] tried to point out the inconvenience and anamolies flowing from the recognition of a hereditary right in respect of such offices. I said in that decision "that a claim to succeed by hereditary right to a trustee's office or to a religious office or to any other office should be looked upon with strong disfavour by Court, whether the office was created by a Hindu or a Mussalman or an adherent of any other creed. The holding of any office should depend on the necessary qualifications and, while heredity might raise a feeble presumption of fitness to be considered by Courts in arriving at a decision on the question of the successorship, to the office, it could not be raised to the dignity of a principle which creates a right of succession to any office, unless the terms of the original foundation of the office constrain the Courts to treat heredity as the factor to be concerned in deciding on the right to the office or unless there has been such a precise and uniform course of descent by heredity (almost irrespective of any consideration as to the person's fitness for holding the office) as to raise an irresistible inference as to the intention of the original creator of the office." Of course, in the case of religious offices, mere heredity alone cannot form a complete qualification entitling the heir to become the owner of such an office. A religious office in a Hindu temple, though it is a hereditary office, cannot surely be acquired through mere heredity. Let us suppose that the son of the last office-holder has become a convert to another religion.

1. (1918) 26. M. L. J. 115.

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Even though Act XXI of 1850 removed the disqualifications to inherit properties which disqualifications formerly existed on the score of conversion to any other religion, it did not and could not remove the disqualifications to inherit an office owing to the nature of the office being connected with the Hindu Religion. A temporary disqualification such as minority and curable insanity, death pollutions and birth pollutions and so on, are, no doubt, no obstacles to obtain the right to a religious office by heredity. But permanent personal disqualifications do in my opinion prevent the acquisition of the right to hold a religious office notwithstanding that the condition of being the next heir to the previous holder of the office is fulfilled.

As regards the Archaka office in a Saivite temple which has been established according to both Vedic and Tantric rites, it is the settled custom that females by reason of their sex are permanently disqualified from performing the duties of the office of Archaka. This proposition is not only not disputed by the appellants, but the affidavits filed on their own side establish it. It is no doubt an interesting question whether this disqualification by custom is really in accordance with the ancient shastras. I am inclined to the view that Brahmin ladies who have become twice born by the proper sacraments, (the marriage sacrament in later days considered as the only sacrament proper to all ladies even Brahmins by birth) are entitled to pronounce vedic mantrams and to hold religious offices, but a discussion of such a question is purely one of academical interest now and I must resist the temptation to enter upon such a discussion as the question is now settled against the rights of the fair sex on the strength of mediæval legal authorities. These legal authorities have twisted even a Vedic text (which related to the disqualification of a lady in the Vedic days by reason of the feebleness of the nervous organization to share in the Soma drinks) as a disqualification to her inheriting any property, though the unnatural rigour of that monstrous rule was qualified in favour of the wife, the mother and the grandmother by the argument that these ladies are entitled to inherit by reason of special texts. Taking it then, that a woman is disqualified by her sex from doing the duties of a religious office, can it be said that she can still be the owner of that office by inheritance, overcoming the disqualifications to perform the duties

of the office by an expedient of having them performed through a male proxy. I am clearly of opinion that on principle, a personally disqualified heir, *i.e.*, permanently disqualified to do the duties of an office, cannot inherit the office while at the same time delegating the duties to others. Whether the permanent disqualification is the result of conversion to any other religion, or insanity or sex I am unable to see why any distinction should be made in the results of such disqualification. I do not see any reason how the disqualification to perform the duties can be logically separated from the disability to inherit the rights, consequent on such disqualification. Coming to the authorities, I shall consider them under three headings (*a*) those which relate to the alienability of a religious office, (*b*) those which relate to the disqualification by sex to hold a religious office (*c*) those which relate to a compromise of litigations involving rights which are not ordinary rights but rights connected with public or quasi public duties (I shall quote only a few authorities under each head.).

In *Kuppa* v. *Doraswami* [1] it was held following *Kayaka Ilate Kanni alias Grani* v. *Yadathil Vellayangot Achuda Pisharodi* [2] and the decision in Special Appeal 759 of 1876 that the sale of the office of temple pujari was invalid. In *Kuppu* v. *Dorasami* [1] no objection *had* been taken in the Lower Courts to the validity of such a sale and yet the High Court upholding the objection raised in Second Appeal, dismissed the alienee's suit. The learned Judges doubt the correctness of the decision in *Mancharama* v. *Pranshankar* [3], to the effect that that the sale if made to a person in the line of heirs and qualified to perform the duties of the office is not illegal. In *Rajaram* v. *Ganesh*, [4] *Parsons and Ranade JJ.* approve of the decision in *Kuppu* v. *Dorasami* [5]. That decision related to the sale of a *vritti* office. The learned Judges consider the Bombay decisions as to the alienation of a religious office and make the following remarks "It appears from the authorities cited, and from others which will be noticed further on, that a distinction has been made by the Courts between *Vrittis* such as those in dispute in this case, and defined in *Ganesh* v. *Shankar*, [6] and the right of hereditary

1. (1882) I. L. R. 6 M. 76.
2. (1868) 3 M. H. R. 380.
3. (1882) I. L. R. 6 B. 298.
4. (1898) I. L. R. 23 Bom. 131.
5. (1882) I. L. R. 6 M. 76.
6. (1886) I. L. R. 10 B. 395.

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service in temples private and public, and between alienation to strangers and to members of the family and, lastly, between cumpulsory and private alienation." Then the learned Judges say that custom and practice must be followed in such cases. In *Sennayan* v. *Sinnappan* [1] *Munro and Sankaran Nair JJ.* upheld the contention of the respondent's counsel as to the inalienability of a non-hereditary religious office and that a renunciation in favour of even the next senior member of the family by the eldest member who held the office was invalid. Thus the Madras High Court, to use the argument of respondent's counsel in that case, "has not accepted the position taken by the Bombay and Calcutta High Courts," namely, that alienation to the next in succession is valid. That the office of Archakas differs in many respects from a purely secular private office goes without saying. In *Seshadri Iyengar* v. *Ranga Pattar* [2]. it is stated "the position of an Archakar though he may have a hereditary tenure in the office, is in our opinion, essentially that of a servant." He is subject to the discipline of the trustee of the temple. And it is impossible to admit that a servant can alienate his office with its appurtenant emoluments at his pleasure (even to another qualified person) especially without the consent of his master for, by such alienation he would encroach upon the rights of his master. I might add that as regards Mahomedan religious offices also, the case in ***Sarkum Abu Turab Abdul Waheb*** v. ***Rahaman Buksh*** [3] has established that the sale of such a religious office is invalid. ***Macpherson***, J. said in his judgment in the case in ***Juggernath Roy Chowdhry*** v. ***Kishen Pershad Burma alias Raja Babu*** [4] "Such a sale would practically destroy the endowment, or have the effect of defeating the whole object of its creation. There would be no guarantee that the service would be properly kept up, for the purchaser whoever he might be, even if a Mahomedan or a Christian, would have the right of performing the worship of this Hindu idol." Then in ***Rajah Muttu Ramalinga Setupati*** v. ***Perianayagum Pillai*** [5] their Lordships of the Privy Council said that the sale of a trusteeship for the pecuniary advantage of the trustee, even though sanctioned by custom, will not be valid. Their Lordships say that they would be disposed to hold that "that circumstance alone," *i. e.*, the circumstance that the

1. (1910) 20 M. L. J. 654.
2. (1911) 21 M. L. J. 580. at p.582.
3. (1897) I. L. R. 24 C. 83.
4. (1867) 7 W. R. 266.
5. (1874) L. R. 1 I. A. at p. 209.

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alienation was for the pecuniary advantage of the vendor, "would justify a decision that the custom was bad in law." Hence I am quite clear that the alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld even if a custom is set up sanctioning such an alienation. Some affidavits on the appellant's side in this case speak to alienations by way of mortgages and sales, in favour of even Vellalas and Chetties, of the Archaka office and its emoluments and the appellants wish us to uphold the validity of even such mortgages and sales to disqualified persons on the ground of practice and custom and to uphold the rights of such disqualified alienees to have the duties performed through a Brahmin substitute. I am inclined to hold that such customs and practices are illegal.

Coming to the next set of authorities, it has been no doubt, held that sex is no disqualification for a lady to hold the office of management of a religious trust whether Hindu or Mussalman. The case in *Mallikarjuna* v. *Sridevamma*, [1] was a case in which a widow succeeded to the trusteeship of a charitable endowment and her right to succeed was not questioned. In *Dhun Cooverbai* v. *Advocate-General*, [2] a female was held entitled to be the Mohunt of a Bairagi Mutt but it is doubtful whether her right was not recognised in that case on the ground that the custom of that particular Bairagi community did not disqualify a female from holding that office. Managers of several temples have been Sudras. (See *Radha Mohun Mundal* v. *Jadoomonee Dossee* [3]). In fact, several non-Brahmin Tambirans are managers of many temples in Southern India. Hence so far as the question of the management of temples or Mosques is concerned, sex is no disqualification. But as regards the office of temple Pujari or Acharyapurusha or other priestly office in a temple or a mosque or among a community, there are cases which show that disqualification to inherit by reason of sex can exist. In *Seshammal* v. *Soondararaj Ayengar* [4], it was held following the opinion of the Sudder Court Pandits, that a woman was disqualified by reason of her sex from inheriting the office of Acharya Purusha. The Pandits clearly say that a lady being the next heir under the ordinary Hindu Law, to the properties left by the last male, cannot by itself entitle her to inherit also the office of Acharya

1. (1897) I.L.R. 20 M. 162, S.C. 7 M.L.J. 289. 2. (1899) 1 Bom. L. R. 743.
3. (1875) 23 W. R. 369. 4. (1858) M. S. D. A. 261.

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Purusha left by the said male owner (though lands were attached to that office as emoluments) as she was disqualified by reason of her sex from performing the duties of the office. The Pandits seem to have, when pressed with the further questions, attempted to make a distinction between the Acharya Purusha office and the office of Archaka or Purohitha and to have been inclined to hold that these other offices which, though religious offices are not of as high a character as an Acharya Purusha's office may be inherited by females, though females could not perform the duties of these offices and that such female heirs might employ male substitutes to do the duties of these lower offices while themselves enjoying the emoluments; but that opinion was clearly *obiter* and no reasons were given or authorities quoted by the Pandits. In *Janokee Debea* v. *Gopaul Acharjea* [1] the Calcutta High Court say that a widow who was the heiress of her husband as regards private properties, cannot by reason of that simple fact claim to be entitled also to succeed to her husband's right to hold the office in a temple. The learned Judges say "The presumption in her favour from her husband having been in possession would not apply in this case in the same way and with the same force as if the question were—who was to succeed to her husband's private estate. There the ordinary rule of inheritance must prevail unless displaced by some special rule. Here the very question at issue is whether the rule of inheritance prevails at all. Of course, the duties of the office of *Shebait* may merely involve the management of the trust and in that case, there is no disability in a female heir to succeed to the office but if it also involves the Archaka duties, I think that sex is a disqualification according to the accepted law. In *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff* [2] the office in question involved the reading of the Fatiha in a Mosque. The person holding office was called the Mujavar. The learned Judges (Turner, C. J., and Kinderseley, J.) say:—" It appears from the evidence that the office of Mujavar entails the discharge of duties of a spiritual character, such as reading the Fatiha, offering prayers and incense, &c., which could not conveniently be performed by a woman. There is no satisfactory evidence that the office has ever been held by a woman, except in one instance and that was at a different place, and in that case it is admitted there were in the family in which the office was hereditary no male members by whom its functions

1. (1877) I. L. R. 2 C. 365. 2. (1880) I. L. R. 3 M. 95.

could be discharged. Then the learned Judges say that the decision in *Hussain Bibi* v. *Hussain Sheriff*[1] notices the distinction which exists between a trusteeship for secular purposes, which can be held by a woman, *and an office entailing religious duties, for which a woman is not eligible.* Vrihan Naradiya Purana (it may be a spurious Purana but it has been accepted as an authority) says that women and sudras are not competent to touch the images of Vishnu or Siva. In the *Padma* Purana, the disability of females is assumed in several passages.

In Colebrooke's Digest Vol. 1 at page 379 it is said:—"On this point it is argued, that, as the rites cannot be performed by an ignorant or disabled person, the law directs that he shall be forsaken, intending that the rites should be performed by means of a substitute: but the ignorant person has property in the sacrificial fees and the like, as the owner of a slave has property in the wealth acquired by the slave, and this construction should be settled on the strength of the admission of a property vesting in the heir. The text which ordains that "a person unable to act shall appoint another to act for him," is the foundation for this construction: *but the property of an outcaste or other person disqualified for solemn rites, is absolutely lost, in the same manner with his right to the paternal gold, silver and the like.* This will be explained in the fifth book, on inheritance. *Wives and others, disqualified by sex for the performance of holy rites, cannot appoint a substitute as a defiled person cannot perform a solemn act ordained by the Vedas: therefore wives have no property in the office of priest.* No doubt, Mr. Ganapathi Aiyar says in his learned book at page CLVIII "As usual with the discussions of Jagannatha it is difficult to say what his final opinion is." But I am inclined to think (differing from the learned author Mr. Ganapathi Aiyar) that the inclination of Jagannatha's opinion was that just as an outcaste cannot inherit a religious office by reason of his permanent disqualification, women also cannot. If I understand the appellant's learned vakil's contention aright, he seemed to admit that it might be a question whether the trustee of the temple has not got a voice in accepting the male substitute thrust by a female heir on the temple to perform the duties of the office and whether the trustee is bound to accept any qualified substitute. If personal disqualification is no hindrance to inheriting the office, why should not a convert to Christianity or Islam convert also inherit the

1. (1868) 4 M. H. C. R. 23.

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religious office and provide a substitute. In the result, I hold that permanent personal disqualification to perform the duties of the office is also a disqualification to inherit the right to enjoy the emoluments attached to the office.

Coming to the last set of authorities, in *Manmohini Guha* v. *Banga Chandra Das* [1] it was held that a grant of probate which establishes a right *in rem* cannot be made merely on the consent of parties and that an agreement or compromise which involve a right affecting not only the parties to the action but the public cannot be compromised so as to oblige the Court to pass a decree in terms thereof. The learned Judges say that "an agreement or compromise as regards this issue, if its effect is to exclude evidence in proof of the will is not lawful within the meaning of S. 375 of the Code of Civil Procedure, when the Court has not an opportunity of judging for itself whether the will is the will of the deceased person and to what extent the rights of the parties will be affected, if the agreement be allowed to be made a rule of Court." The Court itself has certain duties in connection with a case in which the judgment *in rem* has to be pronounced. or in a case which involves the right of the public or the right to a religious and charitable office, or the right of a minor or other incapacitated person. Where an agreement or compromise attempts to affect such rights after they are brought before the Court for adjudication, it seems to me, that it is not a lawful agreement or compromise. In *Muhamad Ibrahim-Khan* v. *Ahmad Said Khan* [2] the learned Judges say: "A party can refer a matter of a private individual right of a civil nature to arbitration, but he has no power to refer a matter *which is not purely of a private civil character*, and it is on this ground that a Bench of this Court in *Mahadeo Prasad* v. *Bindeshri Prasad*, [3] held that the appointment of a guardian to a minor not being a matter of a private right as between parties, was not a question which could be settled by reference to arbitration; Then the learned Judges say "the right to the office of a trustee to a public charity cannot also be settled by private arbitration."

As I have shown above the duties of the Archaka office are more important than the rights of the office-holder: the rights of the deity to have the duties of the office performed are entitled

1. (1903) I. L. R. 31 C. 357. 2. (1910) I.L.R. 32 A. 503 at p. 513.
3. (1909) I.L.R. 30 A. 137.

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to much more consideration than the so-called hereditary rights of any particular person to hold the office and it therefore seems to me that the dispute involving the right to such an office when it has once been brought before a Court for adjudication cannot be settled lawfully by a mere Razinama between the parties. To summarise, I hold that the Razinama in this case is not lawful (1) because it is really an alienation of a portion of a religious office, that is the right to receive the emoluments of the office during certain days in the year, (2) because the alienation is made in favour of persons who are permanently disqualified to hold the office and (3) because there can be no lawful compromise made of a dispute in respect of a religious office, the proper performance of the duties of which, concern not merely the parties to the compromise but principally affect the religious trust itself and the Hindu public for whose benefit the religious trust exists.

As held in ***Jenkins*** v. ***Robertson*** [1], the decree by consent between a plaintiff (who is allowed to represent the public) and the defendants, would not bind the public at large and it is only the result of a contested litigation which would bind the public. A judgment by consent will not bind the public even if it was not a purchased consent and *a fortiori* if such consent was a purchased consent. In the present case, the rights obtained by the plaintiffs under the disputed compromise were clearly purchased rights. In *Raja M. Bhaskara Setupati and Irulappa Nadan* v. *Narayanaswami Gurukkal* [2] this Court refused to allow the Raja of Ramnad who was a temple trustee to compromise a dispute with the Shanars which related to the alleged rights of the Shanars to enter the temple, because such a compromise affected the usages of the temple and the rights of other sections of the Hindu public. (See also *Gyanananda Ashram* v. *Kristo Chandra Mukherji* [3].)

In the result, this petition 924 of 1913 in which the plaintiffs (appellant's) pray for the passing of a decree in accordance with the terms of the Razinama must be and is dismissed. There will be no order as to costs, as the 1st defendant, having agreed to the compromise, has succeeded in his objections not on the ground of any merits in himself but on the ground of public

1. (1867) L. R. 1 H. L. Sc. 117. 2. (1901) 12 M. L. J. 360.
3. (1904) 8 C. W. N. 404.

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policy which requires the Court not to accept the compromise in the interests of the public and of the religious trust.

Tyabji, J :—I have had the benefit of reading the judgment prepared by my learned brother. I agree that the compromise cannot be upheld. As he has discussed the law in detail, it is unnecessary for me to do the same. But with regard to the main question, whether a Hindu female can hold the religious office which is the subject of litigation, I should like to indicate why I have come to the conclusion that the compromise cannot be upheld.

The founder of a religious charitable institution has wide powers of laying down the manner in which he requires the institution to be administered, and that power includes the laying down of the method of filling the offices necessary for administering the institution. So that if he desires that the office bearers shall be selected in any particular mode, his desire is, as a rule, given effect to. But his desires will not be given effect to if, for instance they are opposed to public policy or if they are opposed to the fulfilment of the general object of the institution.

Where, therefore, the question is whether a particular person should succeed to a religious office, the first matter to which attention must be directed is, in what method did the founder of the institution desire that the succession to the office should devolve? Where the founder has put his desires in writing in the form of a trust deed or sannad or some similar instrument, it only remains to interpret that instrument, and to see whether there is anything in law or in the nature and objects of the institution to prevent these desires being given effect to. But where, as frequently happens, there is no written instrument laying down the terms in accordance with which the institution is to be administered, the course of practice in the past may furnish indications of what the founder must have intended, and this may be supplemented by the general law and also by a consideration of the customs and usages prevailing in similar institutions in the same locality.

Where, therefore, the question arises whether a particular person is entitled to hold the office, and that person bases his claim on the hereditary devolution of the office, it must, in the first instance, be determined whether, as a matter of fact, the

founder desired that the office should devolve hereditarily. If it is found that he did so desire, then the question will be whether there is any reason why that desire should not be given effect to. If, on the other hand, it is doubtful whether he did so desire, a number of considerations must arise. In the particular case with which we are now dealing, the first question that is involved is whether the office was intended to devolve hereditarily and in such a manner that, if the person indicated by the hereditary principle is a female and if her sex necessarily disqualifies her from performing the functions of the office, still she must be deemed to hold the office having the right to get the functions of the office performed by a deputy. There is no instrument showing what the intentions of the founder were, therefore, to discover whether he could have intended to lay them down as is claimed on behalf of the plaintiff. In considering whether such could have been the intention of the founder, regard must be had to the point whether the hereditary system of selection is merely chosen as an easy mode of selecting the person who is to hold the office, or whether it is intended to provide that the property should belong to the first office holder and his descendants. For this purpose an important consideration appears to be whether the emoluments of the office are commensurate with the duties to be performed by the person holding the office. Thus, if it is found that the functions of the office are such that they may be performed by any member of a large body of persons, and that no special abilities or moral qualities are necessary for enabling the person to perform the duties satisfactorily, in such a case the expenses of getting the duties performed are frequently in the nature of fees paid to Brahmins or other members of the priestly class for conducting the ceremonies, and these fees are fixed within certain limits by custom. The fact that a higher fee may be demanded by one person for performing such ceremonies does not imply that he will perform them better than another; for *exhypothesi* the functions are such as can be performed equally well by any one of the body of persons who are competent to perform them. Where, then, the functions of the office are of such a nature that the expenses for performing them consist of more or less fixed fees, and where it is found that the emoluments provided for the performance of these functions are far in excess of the necessary usual fees, and where in such a case the office is made to devolve

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hereditarily these facts may furnish indications that the intention of the founder was that the property should remain in the family of the first office holder but should be charged with the expenses of getting the duties of the office performed, with liberty to the members of the family to perform the duties themselves and thus to save the paying out of fees to a third person.

In such a case, therefore, I should be less inclined to hold that a person who would be entitled to the property by heredity should be deprived of that property because that person cannot himself or herself fulfil the functions; for I have started with the assumption that the functions are of such a nature that they can easily and satisfactorily be got to be performed by payment of comparatively small fixed fees. The institution in such a case does not suffer by the heir of the last office holder being the nomial office holder, and the duties being performed by another person.

The case, however, is entirely different where the functions of the office are such that they require peculiar qualifications, intellectual or moral, for performing them: as, for instance, if the functions consist of giving expositions of religious or moral duties. In such a case, where a large income is set apart for the remuneration of the office holder, it may well be inferred that the founder desired that the best available person should be selected to fill the office, and it is obvious that the higher the remuneration offered the greater the chances of obtaining a competent person to discharge the duties. In such a case, to hold that one person should nominally be the office holder and should take the full emoluments provided by the founder for the office, and should, out of a portion of such emoluments, remunerate the person who is actually to perform the functions of the office, would be to get a person to perform the functions on payment of much smaller emoluments than were intended by the founder, and in this way to prevent as competent a person being available for the performance of the functions as had been provided for by the founder.

For these reasons, though I am not prepared to lay down broadly that in every case it is opposed to public policy to provide that a religious office should devolve hereditarily even on persons not themselves qualified to discharge the duties of the office neither am I, by any means, of opinion that such a provision

can always be given effect to. It seems to me that the question must be decided with reference to the particular facts of the case, including the nature of the functions to be performed by the office holder according to the directions of the founder, the remuneration provided for the performance of those functions, and similar other matters.

Now on the facts of this case, it would seem (and my learned brother informs me to the same effect) that the particular office concerned is in its nature such as requires special qualifications for being properly filled. Its functions are not such as can be discharged by any individual; a fit and proper person must be selected for discharging them satisfactorily. The emoluments also are such that no surplus is left after providing a fair remuneration for the office holder; to lessen those emoluments would be to prevent a proper person being selected for holding the office, and for its functions being discharged in the manner that they ought to be discharged.

Under these circumstances I agree that we cannot proceed on the basis that the office with which we are dealing can be permitted to be the subject of a compromise by which a female is to hold it in form, and to get its functions performed by a male proxy.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling, and Mr. Justice Sadasiva Aiyar.

S. Sabapathy Pillay and others. *Appellants,* Legal Representatives of the deceased appellant (plaintiff).*

v.

Vanmahalinga Pillay and another. *Respondents, (Defendants 2 and 3.)*

Civil Procedure Code, O. 23, R. 3 (O.C.S. 375)—"relates to subject matter of suit"—Terms forming part of consideration—Objection that terms do not relate to subject matter—Not open in execution—Contract Act, S. 54—Reciprocal promises—Non-performance by A wrongfully, by B rightfully because of A's non-performance—Contract at an end—Terms in favour of B not enforceable—Claim only for compensation—Offer—Essentials of—Readiness to release without executing release deed, insufficient—Offer to release if payment made within one week conditional—Continuing offer—Opportunity to test offer—Necessity for.

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* A. A. O No. 230 of 1911, 16th January 1914.

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In a suit upon a simple bond for Rs. 10,000 executed in favour of the plaintiff by the 1st defendant and the deceased father of defendants 2 and 3, the parties compromised all their disputes including that about the suit bond and agreed that on plaintiff depositing Rs. 18,000 which he had to pay under a sale in his favour by the 1st defendant, within a certain time, defendants should get released those properties and certain other properties which had fallen to his share from the claim under a mortgage decree and that on defendants fulfilling the conditions imposed on them, the claim of the plaintiff on the suit bond should be set off against the claims of the defendants and plaintiff should pay Rs. 2,200 to the defendants and a decree was passed in terms of the compromise 'so far as those terms related to the subject matter of the suit.' Plaintiff failing to make the deposit, defendants applied in execution for the payment of Rs. 2,200 according to the compromise. Plaintiff resisted the application on various grounds. He contended that as the term as to Rs. 2,200 did not relate to the subject matter of the suit, no decree could be taken to have been passed in respect of it, and that the decree if one had been passed in respect of it, was *ultra vires*. He also contended that the defendants having precluded themselves from performing their part of the contract by the conduct of the 3rd defendant taking an assignment of the mortgage decree and purchasing the properties himself, could not enforce the payment.

Held: that as the settlement of all the disputes and the payment of the amount was a part of the consideration for the compromise, the compromise was validly made into a decree and that even if it were otherwise, objection to the validity of the decree on that ground could not be taken in execution.

But *held*: though, in the first instance, plaintiff had committed default by not making the deposit, defendants not having performed their part of the contract, nor made a continuing unconditional offer to comply with the terms of the contrac giving a reasonable opportunity to the plaintiff to see if the thing offered was the thing he was entitled to get but having by the conduct of the 3rd defendant precluded themselves from performing their part of the contract they could not enforce the clause for payment in their favour.

If both parties to a contract, A and B fail to perform their reciprocal promises, A wilfully, and B because he was not bound to fulfil his part unless A fulfils his part of the contract, the contract itself comes to an end by act of parties, and B can no longer claim performance of the specific obligation undertaken by A under the contract his only right being to claim compensation.

Held: An offer that the 3rd defendant was ready to release the properties from the mortgage decree if the plaintiff paid Rs. 18,000 within a week was not an unconditional offer and could not have the same effect as performance.

Held also. A mere offer by posted letter, that the 3rd defendant was ready to execute a release without having a document of release ready, was not a proper offer under S. 38 of the Contract Act.

†

Appeal against the order of the Court of the Subordinate Judge of Mayavaram, dated the 6th day of July 1911 in E. P. No 193 of 1910 in O. S. No. 29 of 1907.

This Appeal coming on for hearing on Thursday, the 20th day of February, 1913, the Court (Benson and Sundara Aiyar, JJ.) delivered the following

Judgment:—We see no reason to differ from the finding of the Subordinate Judge with regard to the 1st and 2nd conditions to be fulfilled by the 1st defendant before the 2nd and 3rd defendants could claim to take out execution for the amount in question. But the finding with regard to the 3rd condition is unsatisfactory. It is admitted that the plaintiff did not deposit in Court the amount that he was bound to deposit, but the plaintiff alleged in his objection petition that the 3rd defendant had taken an assignment of the decree in O. S. No. 66 of 1905 and brought to sale the properties allotted to the plaintiff contrary to the obligation undertaken by the 1st defendant to obtain a release of those properties from liability for the decree. If this allegation be true, they certainly cannot take out execution for the amount in question. We request the Subordinate Judge to take evidence on the above question and submit his finding thereon ; and also on the question whether the defendants were ready to fulfil their obligations under paragraph A (3) of the Razinamah. We reserve the questions whether clause B of the Razinamah can be treated as a part of the decree, and, if so, whether it is executable or should be regarded as declaratory. The findings will be submitted within two months after the receipt of this order and seven days will be allowed for filing objections.

In compliance with the order contained in the above Judgment, the Subordinate Judge of Mayavaram submitted the following

FINDINGS.

1. The following questions have been remitted by the High Court for findings.—

(1) Whether as alleged by the plaintiff, the 3rd defendant has taken an assignment of the decree in O. S. No. 66 of 1905 and brought to sale the properties allotted to the plaintiff contrary to the obligation undertaken by the first defendant to obtain a release of those properties from liability for the decree.

(2) Whether the defendants were ready to fulfil their obligations under paragraph A 3 of the Razinamah ?

2. After the remand, the plaintiffs (respondents) have examined one witness and filed exhibits I to IV and defendants 2 and 3 (petitioners) have filed exhibits F and G. There is no doubt that the 3rd defendant has taken an assignment of the decree in O. S. No. 66 of 1905 of the Kumbakonam Sub-Court and brought to sale the properties charged under that decree which is a moiety of all the properties mortgaged including the properties allotted to the plaintiff. The 3rd defendant has

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since purchased such properties and obtained symbolical delivery too. Exhibit I is the assignment deed of the decree to the 3rd defendant. Exhibit II is a copy of the sale certificate to the 3rd defendant and exhibit III is the delivery account. These are all admitted for the petitioners. The only question is whether these have been done contrary to the obligation undertaken by the 1st defendant to obtain release of those properties (the properties allotted to the plaintiff) "from liability for the decree." In considering that matter, it is first of all necessary to exactly understand the 3rd condition in paragraph A of the Razinamah. It is this. The plaintiff undertakes to deposit Rs. 18,000 and interest as provided in four months of the Razi and the defendants are charged with the obligation to get the release of the plaintiff's share of the properties from liability to the decree in O. S. No. 66 of 1905, in 16 months from the date of the Razinamah. That means that even after the deposit of the money into Court by the plaintiff, the defendants had apparently another 12 months' time to get the release.

3. Now it is necessary to note a few dates. The Razinamah was on the 9th April 1908. So the plaintiff was bound to deposit the Rs 18,000, and interest— it would have amounted to about Rs. 27,000 then—by the 9th August 1908. The amount was not deposited within that time. The decree-holder in O. S. No 66 of 1905 proceeded with the execution of that decree and the sale was fixed for the 3rd March 1909. In order to avert the sale, the 3rd defendant appears to have bargained for taking the assignment of the decree and he is seen to have actually obtained the assignment as per Exhibit I on the 10th July 1909. It may be noted that under the Razi the defendants 1 to 3 are made liable to get the release to the plaintiff. In less than a month of the assignment, we find the 3rd defendant and 1st defendant sending the registered notices D and E to the plaintiff on the 7th August 1909. Then the 4 months' time for the deposit by the plaintiff had long past and even the 16 months' period within which the defendants were to act their part was to expire in two days more. By these registered notices, the plaintiff was even then called on to pay up the amount payable in a week and even then there was no response. In fact the plaintiff returned the registered notices refused. These notices Exhibits D and E show that the assignment to the 3rd defendant was not to circumvent the plaintiff, and that the defendants gave the plaintiff an opportunity of performing his part even at that late stage. In this state of matters it is futile for the plaintiff to contend that the 1st defendant was without the means to pay the balance of the amount due for the decree in O. S. No. 66 of 1905 and that he would otherwise have deposited the amount due by him. Even granting that the 1st defendant had no means then, there were the defendants 2 and 3 who, as I have already said, were also responsible for getting the release and the plaintiff's own witness admits that defendants 2 and 3 are rich men. Nor was it necessary that all the moneys due under the mortgage decrees should be paid for getting the release of the plaintiff's portion of the properties. In paragraph 5 of the counter-petition, the plaintiff states that he tendered the amount to the original plaintiff in O S. No. 66 (Murugappa Chetty) but that he refused to receive it and give a release. That is not the undertaking in the Razinamah and there is no proof of such tender. Exhibits F and G show that Murugappa Chetti's heirs applied for execution of the decree more than once. The plaintiff's witness admits that plaintiff had notice of such petitions. Still he is not shown to have opposed the execution on any ground. Not even after the petitioners applied for execution in this case does the plaintiff appear to have offered to deposit the amount. Under these circumstances, I cannot say that the assignment to the 3rd defendant was contrary to the obligation laid by the Razinamah and I must hold that the defendants were ready to fulfil their obligations.

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This appeal came again for hearing after the return of the findings upon the issues referred by this Court to the Subordinate Judge of Mayavaram.

K. Ramachandra Aiyar for Appellant.

K. Srinivasa Iyengar and S. Muthiah Mudaliar for Respondent.

The Court delivered the following

Judgment :—*Sadasiva Aiyar, J.* :—The judgment debtor is the appellant in this appeal preferred against the order of the Subordinate Judge's Court of Mayavaram passed on the execution petition filed by the 2nd and 3rd defendants as decree holders.

The facts are a little complicated but it is necessary to set out many of them in order to understand the contentions in this appeal.

The plaintiff and the 1st defendant are brothers. They effected a partition of their properties about July 1897. In that partition, about 34 items of landed properties (among other properties) were divided between the plaintiff and the 1st defendant, the plaintiff obtaining for his share certain specific properties out of the 34 properties and the 1st defendant the remaining properties. In June 1899, the 1st defendant and the father of the defendants 2 and 3, since deceased, executed a simple bond for Rs. 10,000 in favour of the plaintiff. It has here to be mentioned that though the plaintiff got in the partition of 1897 certain specific properties out of the 34 items of land, all the 34 items had been mortgaged by the 1st defendant before the partition in favour of a third person whom I will call the mortgagee. This mortgagee brought suit No. 66 of 1905 on the file of the Kumbakonam Sub-Court for sale of those 34 items against both the plaintiff and the 1st defendant; the plaintiff (without protest apparently from the 1st defendant) seems to have raised the plea in the mortgagee's suit that one half share in all the 34 items belonged to him and that the said half share was not liable for the mortgage as the sum advanced by the mortgagee to the 1st defendant was not a debt incurred by the 1st defendant for the benefit of both the plaintiff and the 1st defendant. The plaintiff, if the debt was not a proper debt, might have had those particular items (out of the 34 mortgaged items) which fell to the plaintiff's share released from liability under the mortgage, but, as I said above, he seems to have attempted to get one half share in every one of the 34 items released from the mortgage. One

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other complication in the case is that in January 1903, the 1st defendant seems to have sold some of those properties which fell to his share (out of the 34 properties) to the plaintiff for Rs. 13,000 and asked the plaintiff to pay that Rs. 13,000 to the mortgagee in part satisfaction of the mortgage debt. The plaintiff had failed to pay that Rs. 13,000 to the mortgagee and hence the mortgagee brought his suit No. 66 of 1905 to recover the entire amount due under his mortgage by sale of all the 34 properties.

That suit No. 66 of 1905 was decreed only for the sale of one half share in all the 34 properties and the Court released the other half share on the footing that the plaintiff was entitled to the said half share in all the 34 properties. The partition under which the plaintiff got certain specific items out of the 34 properties was thus ignored by that decree. It is not clear whether it was ignored because the partition was held invalid or not proved or because the partition was not relied upon and put forward by any of the parties.

The present suit was brought by the plaintiff in 1906 as O. S. No. 38 of 1906 (in the Kumbakonam Sub-Court) on the simple bond for Rs. 10,000 executed in June 1899 by the 1st defendant and the father of the defendants 2 and 3 for the recovery of Rs. 18,000 and odd due under that bond. This suit No. 38 of 1906, of the Kumbakonam Sub-Court, afterwards became suit No. 29 of 1907 on the file of the Mayavaram Sub-Court. On the 9th April 1908, a Razinamah petition was filed in this suit by the plaintiff and by the defendants 1 to 3 compromising all the disputes between the plaintiff and the defendants. The Court on that same date decreed in terms of the Razinamah " so far as those terms related to the suit as detailed below". It is doubtful (and it is a matter of dispute between the parties) whether by detailing all the terms of the Razinamah in the decree after stating that the Court decreed in terms of the Razinamah in " so far as those terms related to the suit" whether all those terms were intended by the Court as relating to the suit and as decreed in the suit or whether all the terms were detailed merely for the purpose of recording the terms of the Razinamah and only those terms which directly related to the right to recover moneys due under the bond of 1899 were intended to be decreed in that suit.

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Now the terms of the Razinamah are again of a complicated character, but as it is necessary to refer to them for understanding the dispute, I shall set them out briefly. The terms are (A1), that, within the 9th August 1909, the three defendants should fulfil a condition which I will call condition No. 1; (A2), that the three defendants should before that same date (9th August 1909) fulfil another condition which I will call condition No. 2; (A3), that upon plaintiff depositing Rs. 13,000 and interest thereon from January 1903 into Court for payment to the mortgagee the decree-holder in (suit) No. 66 of 1905, the defendants 1 to 3 should within the 9th August 1909 get released from liability under that decree the two sets of properties which belonged to the plaintiff out of the 34 mortgaged properties, those two sets being (firstly) the properties which fell to the plaintiff's share in the division of 1899 and (secondly) the properties which had been included in the sale to the plaintiff by the first defendant in January 1903; (B), that if the three defendants fulfilled the above conditions (A1, A2 and A3) the amount due to the plaintiff under the simple bond of 1899 for Rs. 10,000 and the sum due to the plaintiff of Rs. 3,000 and odd should be set off against the sum of Rs. 16,000 and interest due to the 1st defendant by the plaintiff and that the plaintiff *should pay Rs. 2,200 to the 2nd and 3rd defendants* (which sum would be the balance due to the defendants 2 and 3 after such set off) with interest from May 1899; (C), that if the defendants failed to fulfil conditions A1, A2 and A3 the plaintiff should recover Rs. 20,000 as due to him under the plaint bond with interest from the date of the Razinamah by execution against defendants 1 to 3. (There are certain other minor terms in the Razinamah which need not be stated here.)

Now, the defendants 1 to 3 have fulfilled the conditions A1 and A2. They say that they offered and were ready and willing to fulfil the condition A3 and that their such offer, readiness and willingness should be treated as legally of the same effect as if they had actually fulfilled the condition A3 also. Then, they contend that under clause (B) of the Razinamah decree, the plaintiff ought to pay Rs. 2,200 to them and that the defendants 2 and 3 are entitled in execution of this same decree to recover this Rs. 2,200 and interest from the plaintiff. On these contentions, they filed the execution petition No. 193 of 1910 on the

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26th November 1910 and prayed for the arrest of the plaintiff for the recovery of the Rs. 2,200 and interest. The plaintiff raised several objections to the grant of the prayer of this execution petition of the defendants 2 and 3. Two of these objections, namely, that the defendants 1 to 3 did not fulfil conditions A1 or A2 are useless as the Sub-Court and also a Bench of this Court (when this appeal came on first before this Court) have found that the conditions A1 and A2 had been fulfilled by the defendants before this execution petition was put in. Two other objections of the plaintiff remain to be considered. The first objection is that the 3rd condition (A3) had not been fulfilled by the defendants before this execution petition was filed and not only that the third condition had not been fulfilled before the execution petition was filed *but the defendants had precluded themselves from fulfilling that condition by certain acts of the 3rd defendant.* The second objection was that even if the defendants had fulfilled all the three conditions, the term (B) of the Razinamah petition, namely, that on the defendants fulfilling those conditions, the 2nd and 3rd defendants should recover Rs. 2,200 from the plaintiff was not a term which related to the dispute in the plaintiff's suit brought on the bond of Rs. 10,000 and that therefore there was and could be no decree passed for that amount in the suit No. 29 of 1907 ; in other words, the gist of that objection is that the defendants 2 and 3 should bring a separate suit on the promise recorded as term (B) in the Razinamah decree and cannot claim that an executable decree for that amount has been passed in this suit No. 29 of 1907.

I shall shortly deal with the second objection. Having regard to the nature of the pleadings in the suit No. 29 of 1907, I think that the term (B) of the Razinamah was intended to be one of the considerations which moved the defendants 1 to 3 in consenting to the term (C) of the Razinamah which directly related to the plaintiff's claim. It has also to be noted that the amount of the plaintiff's claim is set off even under the provisions of the term (B) against the plaintiff's claim. I therefore hold that the term (B) is a part of the decreed provisions in the suit No. 29 of 1907 and not merely one of the recorded provisions. In this view, the law laid down in the cases reported in *Joti Kuruvetappa* v. *Izari Sirusappa* [1] and *Purna Chandra Sarkar* v. *Nil Madhub Nandi* [2] applies and the term (B) can be lawfully

1. (1906) I. L. R. 30 Mad. 478. 2. (1908) 5 C. W. N. 485.

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made part of the decree and the liability created by that term can be enforced in execution proceedings. As, on this question, I agree with the observations in *Gobinda Chandra Pal* v. *Dwarka Nath Pal* [1] I shall quote certain passages therefrom.

"The question whether any particular term of a petition of compromise incorporated in a decree, made under a power given by section 375 of the Code of Civil Procedure, relates to the suit, or is covered by its subject matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard-and-fast rule can be laid down, each case being governed by its own facts." "In *Jasimuddin Biswas* v. *Buban Jelini* [2] Brett and Sharfuddin JJ., recognised the binding effect of the term in a decree which was the consideration for the relief granted in a suit as decreed on agreement of parties. The same view was taken in *Gupta Narain Dass* v. *Bijoya Sundari Debya* [3] and *Purna Chandra Sarkar* v. *Nil Madhub Nandi* [4]. In the latter case, Ghose and Pratt JJ., held that a decree passed on a compromise cannot be regarded as ***ultra vires*** simply because it goes beyond the subject matter of the suit and contains other conditions, and that, if those other conditions are the consideration for the compromise of the subject matter of the suit, they must be incorporated in the decree.

Even if the term (B) could not lawfully be made part of the decree once it has been so made part of the decree as I think it has been in this case, the person bound by the decree cannot, ***in execution,*** object to that term as not binding upon him. The appellant's vakil relied upon a passage in *Gurdeo Singh and Chandrika Singh* v. *Rash Behari Singh* [5] where Mookerjee J. says that if a compromise decree "gives effect to the settlement touching properties extraneous to the litigation, the decree is to that extent clearly without jurisdiction and is inoperative. I respectfully dissent from that ***dictum*** as it is opposed to the decision of this Court in *the Manager of Sri Meenakshi Devastanam, Madura* v. *Abdul Kasim Sahib* [6] where Benson and

1. (1908) I. L. R. 35 Cal. 837.
2. (1907) I. L. R. 34 Cal. 456.
3. (1897) 2 C. W. N. 668.
4. (1901) 5 C. W. N. 485.
5. (1908) I. L. R. 36 Cal. 193 at p. 228.
6. (1906) I. L. R. 30 Mad. 421.

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Wallis JJ., held that any objection to such a decree giving reliefs in respect of such matters not relating to the suit, ought to have been taken by way of appeal and could not be urged when execution of the decree is sought.

Now I shall deal with the first and the principal objection of the plaintiff. This objection has again to be divided under two heads. The first head is that defendants have not fulfilled the third condition (A3) and hence cannot take advantage of the provision (B) in their favour. The second heading of the objection is that they have absolutely precluded themselves from fulfilling that third condition. Taking the first head of the objection, the reply of the defendants 2 and 3 is, as I said before, that they had made an offer to fulfil the third condition and as the plaintiff did not accept that offer, the defendants are in as good a position as if they had fulfilled the third condition. It seems to me that in execution of a decree which gives a particular relief to the defendants 2 and 3 *only if a condition is fulfilled,* they cannot get that relief unless they fulfil that condition or unless the fulfilment of that condition has been made impossible by the plaintiff. I also think (*a*) that the offer to fulfil that condition should be kept always open and (*b*) that the offer relied upon ought to be an unconditional offer. Again the second head of the objection seems to me to be clearly valid. The defendants not only have not fulfilled the condition of getting the plaintiff the two sets of properties out of the 34 properties released from the mortgage decree but the third defendant obtained a transfer of the mortgage decree, brought a half share in those two sets of properties belonging to the plaintiff to sale in execution of that decree and purchased them himself. Thus, that mortgage decree has fully operated on and destroyed plaintiff's rights in those properties and the third defendant by his acts has rendered it impossible for the defendants 1 to 3 to get those properties released from the effects of that decree, effects which were threatened at the time of the compromise and consummated afterwards. Of course, as the plaintiff neglected to perform his part of the agreement forming the third condition in the Razinamah, namely, the payment of Rs. 13,000 before the 9th August 1908, the defendants 1 to 3 were not bound to fulfil before the 9th August 1909 their part of that agreement and they could

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under Sections 51 and 54 of the Contract Act refuse to perform their part of the promise and even claim compensation (besides) from the plaintiff for any loss which they have sustained by the plaintiff's non-performance of his preliminary promise to pay Rs. 13,000; but if both the parties to a contract (whom we might call A and B) fail to perform their reciprocal promises, the one (A) wilfully and the other (B) because he was not bound to fulfil his part unless A had fulfilled his preliminary part, the contract itself clearly comes to an end by the acts of both parties A and B *except for the purpose of enabling the innocent party (B) to claim compensation from* A. B, however, cannot claim the performance of the specific obligation undertaken by A under the contract after B had himself (though lawfully) put an end to it. If B wants to hold A to the specific performance of A's contract, B must fulfil his own promise or make an unconditional continuing offer to fulfil his promise. Under Section 38 of the Contract Act, an offer equivalent to performance in the eye of the law must be unconditional. In the present case, the offer under letter Exhibit D is not unconditional as it says that the third defendant was ready to release plaintiff's properties under the decree in suit No. 66 of 1905 only if plaintiff *paid Rs. 13,000 and the interest within one week's time.* Further, an offer under Section 38 (see clause 3 of Section 38) must be such that the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. Now the English and Indian cases have established that a mere offer by registered posted letter to deliver something or rather, the expression by a letter of a willingness or readiness to deliver is not a proper offer. As Shepherd J., says in his Contract Act, A sufficient tender of money is not made if the money is locked up in a box, nor of goods if they are enclosed in a cask which the other party is not allowed to open." Following that analogy, a mere offer by posted letter that the 3rd defendant is ready to execute a release without having a document of release ready to be delivered is not a proper offer. Again as said in *Haj Abdul Rahman* v. *Haj Noor Mahomed* [1] and *Beharri Lal* v. *Ram Ghulam*, [2] the plea of tender is incomplete as an answer to an action (and, by analogy, as an answer to a defence) unless accompanied by a tender in Court.

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1. (1884) I. L. R. 16 B. 141. 2. (1902) I. L. R. 24 All. 461.

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In the present case, the third defendant who obtained the transfer of the decree in suit No. 66 of 1905 did notexecute a release deed, did not show it to the plaintiff and did not offer any such deed unconditionally or even make his mere expression of willingness and readiness unconditional. Hence the offer under Exhibit D was not a legal or proper offer. When the plaintiff failed to pay the Rs. 13,000 the defendants had two courses open to them. They might refuse to perform their part of the promise (namely, the procuring of the release), and claim compensation for plaintiff's breach of contract (see Section 54 of the Contract Act) or they might notwithstanding the plaintiff's breach fulfil their (defendants') part of the contract by performing their reciprocal promise and then claim all their rights under the contract as a subsisting contract. The plaintiff in not having paid the money broke the contract wrongfully and the 3rd defendant in not having got the plaintiff's properties released and in obtaining transfer of the decree and executing it also broke the contract though rightfully and must be deemed under Section 54 of the Contract Act as having also himself avoided the contract. In the result, I hold that the defendants 2 and 3 cannot obtain any relief in pursuance of the term (B) of the Razinamah decree as they have not fulfilled the conditoin (A 3) which is preliminary to their obtaining that relief, as they have never made an unconditional offer to fulfil that condition, as they have never made an offer which gave a reasonable opportunity to the plaintiff of seeing that the thing offered is the thing which he was entitled to get (Section 38 clause 3 of the Contract Act) and lastly as the offer has not been a continuing offer, the defendants having, by the third defendant's conduct, precluded themselves from fulfilling that condition which involves the release of the plaintiff's properties from a decree which subsists no longer as a decree but has resulted in the fruits which have been gathered by the third defendant. In the result, in reversal of the Lower Court's order which allowed the execution of the decree in favour of the 2nd and 3rd defendants, I would direct that their Execution Petition shall stand dismissed. As the plaintiff relied upon several invalid and even dishonest pleas besides the pleas on which he has succeeded I would make no order as to costs in either Court.

Ayling, J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar.

Kanagammal, and another — *Petitioners* * (*Petitioners Plaintiffs*).

v.

Panchapakesa Odayar, and another. — *Respondents.* (*Respondents Defendants*).

Kanagammal *v.* Panchapakesa

Civil Procedure Code (Act V of 1908,)—Order 33, Rules 2,3,5—Pauper application—joining unsustainable claims with good ones—No ground for rejecting—Misjoinder, mistakes of law or fact, not within O. 33 R.2—Power to direct amendment—Inherent power—S. 141—Extension of O. 6, R. 17 by

Order 33, R. 5 does not allow the rejection of an application for leave to sue in forma pauperis on the ground that patently unsustainable claims have been joined in the application with claims that are sustainable.

It is only where the allegations do not disclose any cause of action as regards any of the reliefs that the application could be rejected.

Order 33 r. 5 refers only to rules 2 & 3. O. 33, R. 2 does not deal with mistakes of law or fact or mistakes such as non-joinder or misjoinder found in the plaint.

Suit by a concubine and her son for maintenance against the members of the family of her paramour is not open to the objection of misjoinder.

The power to direct a pauper applicant to amend his application by deleting unsustainable claims, is one of the inherent powers of the Court and no specific provision of the Code is necessary to enable it to exercise the power.

S. 141 C P C. extends the provisions of O. 6, R. 17 to pauper applications.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram in Original Petition No. 359 of 1911.

T. R. Ramachandra Aiyar for Appellant.

T. Rangachariar for Respondent.

The Court delivered the following

Judgment :—Plaintiffs are the petitioners. The 1st plaintiff is the mother of the minor 2nd plaintiff. Their application to the learned Subordinate Judge of Mayavaram to be allowed to sue in *forma pauperis* to obtain reliefs of future maintenance and recovery of arrears of maintenance was rejected by the learned Subordinate Judge. The total value of the reliefs claimed by them was Rs. 11,700. The first plaintiff gave the value of the properties belonging to her as Rs. 327 and the value of the properties belonging to the minor 2nd

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* C. R. P. No. 902 of 12. 12th February 1914.

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plaintiff as nil. The Rs. 327 worth of moveables was of course not sufficient to pay the Court fee stamps on the reliefs worth Rs. 11,700, the Court fee required being Rs. 535. The Lower Court did not go into the question whether the plaintiff's pauperism was established but it rejected the application on the ground that the requirements of O. 33, R. 5, had not been complied with by the petitioners. That Rule 5 says that the Court should reject an application for permission to sue as a pauper (*a*) where the application is not framed and presented in the manner prescribed by rules 2 and 3, (*b*) where the applicant is not a pauper, (*c*) where he has within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, (*d*) where his allegations do not show a cause of action, (*e*) where he has entered into any agreement with reference to the subject matter of the proposed suit under which any other person has obtained an interest in such subject matter. It is difficult to gather from the learned Subordinate Judge's order what particular requirements of Rule 5 O. 33 had not been complied with by the petitioners. It is admitted that the questions (*a*), (*c*) and (*e*) arising under Rule 5 were not considered or relied on by the Subordinate Judge and that those clauses need not be considered in dealing with the petitioners' application. We have only to consider clauses (*a*) and (*d*).

As regards Clause (*d*), unless the petitioners' allegations in their petition do not show "a cause of action" (that is, any cause of action), the Court cannot reject the application. The Subordinate Judge does not say in his order that the allegations do not show any cause of action. He only says that it is doubtful whether the 2nd plaintiff can be awarded maintenance if he was entitled to sue his putative father's undivided brother (1st defendant) for partition of the undivided family properties of his said father and of the 1st defendant.

It is the case of the defendants themselves that the 2nd plaintiff has no such right to sue for partition. If so, the 2nd plaintiff has undoubtedly a cause of action (if the allegations in the pauper application are true) to sue for maintenance. If again the 1st plaintiff is the permanent concubine of the 1st defendant's deceased brother, her claim for maintenance cannot be said to

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be groundless. As said in *Vijendra Tirtha Swami* v. *Sudhindra Tirtha Swami* [1] at page 198, "where there is a ground for reasonable doubt, leave should be granted and should not be refused." In the Full Bench Case, *Rathanam Pillai* v. *Pappa Pillai*, [2] it was held that evidence on the merits of the case of the pauper applicant cannot be gone into in the preliminary investigation of the question whether leave ought to be granted or not and *K. Ranganayaka Ammal* v. *K. Venkatachellapathi Naidu* [3] was followed. It may be that the plaintiffs when they claimed maintenance also on behalf of the two daughters of the 1st plaintiff, have added a claim which is not supported by any cause of action vesting in the plaintiffs but clause (*d*) of Rule 5 does not justify the dismissal of an application simply because some of the several causes of action mentioned by the plaintiffs are not shown to vest in themselves and only the others vest in them. It is only where the plaintiffs' allegations do not show any cause of action as regards any of the reliefs that the application could be rejected under that Rule.

We have thus left only to consider whether the application could be rejected under clause (*a*) of Rule 5. That clause says that if the application is not framed and presented in the manner prescribed by Rules 2 and 3 it shall be rejected. Rule 2 says that the application shall contain the particulars required in regard to plaints in suits and a schedule of any moveable or immoveable property possessed by the applicant, with the estimated value thereof and that it shall be signed and verified in the manner prescribed for the signing and verification of pleadings. As regards the particulars required by plaints in suits, we have to turn to O. 7, R. 1 and those particulars are contained in clauses a to i of O. 7, R. 1. I am unable to find any defect in the application either by omission of any of the particulars required by O. 7, R. 1, by the omission of a schedule of property belonging to the applicant or by the omission of the signature and verification of the applicant. Then as regards R. 3 of O. 33, that rule requires the presentation of the application by the pauper herself or by an authorised agent and there is no defect

1. (1895) I. L. R. 19 M. 197.
2. (1902) 12 M. L. J. 292.
3. (1881) I. L. R. 4 M. 323

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alleged in regard to this particular either. The learned Subordinate Judge seems to think that because the 1st plaintiff's cause of action for her maintenance claim is different from the 2nd plaintiff's cause of action for his maintenance claim, therefore the application is not framed in the manner prescribed by O. 33, R. 2. I am unable to agree with him. In the first place, O. 7, R. 1 which relates to the particulars to be contained in the plaint and which is incorporated in O. 33, R. 2 does not deal with the question of mistakes of law or fact or mistakes of non-joinder or misjoinder found in the plaint. It only deals with the question whether the particulars (*a*) to (*i*) mentioned in that Order are found in the plaint. If they are so found, the application is framed in the manner prescribed by O. 33, R. 2 and that is all what O. 33, R. 2 requires. In the second place, I am unable to see that there is any misjoinder of causes of action so far as the claims of plaintiffs 1 to 2 to be awarded maintenance are concerned. Order 1, Rule 1 allows several plaintiffs to bring a single suit though the causes of action of the several plaintiffs are different, provided that the transaction out of which their separate claims arise is one and that any common question of law or fact exists in respect of the separate claims. In *Nilamadhab Mitter* v. *Jotindra Nath Mitter*, [1] it was held that a husband and a wife and their son could all join in a single suit to recover the maintenance due to them separately, the words of O. 1, R. 1, C. P. C. being relied on for that conclusion.

Lastly it is urged that as the plaintiffs claim maintenance on account of the 1st plaintiff's daughters (2nd plaintiff's sisters) also and as the plaintiffs have no cause of action vesting in themselves to sue for such maintenance, the pauper application which includes such an unsustainable claim must be rejected. As I said before O. 33, R. 5, clause (*a*) does not allow the rejection of the application on the ground that patently unsustainable claims have been joined in the application to sustainable claims. It is only if the application is not framed and presented in the manner prescribed by rules 2 and 3 that the application can be rejected. But it is further contended (*a*) that the Court has not got the power to direct the application to be amended by striking out that portion of the prayer which claims the

1. (1913) 17 C. W. N. 341.

unsustainable reliefs, (*b*) that if the Court has no power to order the application to be so amended, it would be unable to find out the separate value of the sustainable reliefs from the total value of Rs. 11,700 given in the application for both the sustainable and the unsustainable reliefs, and (*c*) that the Court would again be unable in consequence to find out whether the Rs. 327 which is the value of the plaintiffs' properties could cover the court fees due on the sustainable reliefs and hence whether the application to sue as pauper could be granted as regards even the sustainable reliefs. On these contentions, it is argued that the proper course was taken by the Court under these circumstances when it wholly rejected the application.

As regards the argument under the heading (*a*) I do not agree with the contention that the Court has not got the power to order the amendment of the application if it is improperly framed through misjoinder of causes of action and of reliefs. No doubt, O. 6, R. 17 relates only to the power of the Court to allow parties to alter and amend *pleadings*; and the word "pleadings" means only plaints and written statements (See O. 6, R. 1); and an application to sue as a pauper becomes a plaint and therefore a pleading only after it is granted (See O. 33, R. 8). But the power of a court to direct a pauper applicant to amend his pauper application is one of the inherent powers of the court and it does not require any specific provision of the Civil Procedure Code to enable the court to exercise this power. I am also of opinion that S. 141 C. P. C. which makes "the procedure" provided in regard to suits applicable to other "proceedings" also, governs proceedings connected with pauper applications and thus enables the court to apply the provisions of O. 6, R. 17 to such proceedings.

In the result, I hold that the learned Subordinate Judge acted illegally and with material irregularity in rejecting the pauper application on the grounds set out by him. I set aside his order and remand the application for proper disposal with reference to the above remarks. I shall make no order as to costs in this court. Costs in the Lower Court will abide.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

K. K. Narayanan Nambudripad—*Petitioner* * *Appellant.*

v.

M. K. Krishna Patter and others—*Respondents.*

Malabar Law—Kanomdar—Decree for redemption any day within two dates—Lease of uncertain duration—Emblements—Right to—Transfer of Property Act, S. 108 (i)—Malabar Tenant's Improvements Act—Paddy plants, improvements.

A Kanomdar against whom a decree for redemption is passed and who could be redeemed under the decree any day between two given dates is in the position of a tenant holding under a lease of uncertain duration and is entitled to the crops raised by him and standing on the land when he is redeemed.

Per Sadasiva Aiyar, J. (Spencer J. doubting). The paddy plants raised by the Kanomdar are improvements within the meaning of the Malabar Tenant's Improvements Act for which he is entitled to be paid.

Appeals from the orders of the Court of the Subordinate Judge of South Malabar at Palghat in A.S. Nos. 108 and 132 of 1912 preferred against the Orders of the Court of the District Munsif of Alatur in E. P, Nos. 628 and 629 of 1911 in O.S. Nos. 363 and 364 of 1904.

The plaintiff mortgagor got a decree for redemption of Kanom on his depositing within six months from the date of the decree (4th and 5th December 1906) the Kanom amount and value of improvements less arrears of rent from 1077 to 1079 and future rent from 1080 till surrender. The decree directed that on such deposit the Kanomdar (the 12th Defendant) should put plaintiff in possession of the mortgaged properties with all improvements. On appeal the time was extended by six months from the date of the appellate decree (16th March 1909), the Lower Court's decree being confirmed in other respects.

The decree-holder deposited on the 4th September 1909 (20th Chinga 1084) Rs. 2076-7-10 being the balance after deducting the sum which was allowed to be set off against the Kanom and value of improvements directed to be paid under the decree; future rent from 1080-1084 was set off and a petition was put in by him on 7th September 1909 for attachment and delivery of the properties with the crops thereon. Notice of the deposit was issued on 11-9-09. The parties on the 15th September 1909 consented to an amin being deputed to prepare a report on the

* A. A. A. O. No. 122 & 128 of 1912. 19th December 1913.

mesne profits and the crops yielded by each land as also the account of the cultivation expenses. The right of the 12th defendant to the crops then standing on the land or only to cultivation expenses was left to be determined in a subsequent application. But after the execution application was put in and before the amin went to the spot the 12th defendant had harvested the crops on almost all the lands. Possession was delivered on the 17th September 1909. The decree-holder now claims that as he had deposited the Kanom and value of improvements on the 4th September 1909 he is entitled to 6 per ten. of the Kanni produce of that year. Kanni crops raised on the lands in 1084 were harvested in 1085.

The Subordinate Judge held as follows: "The treasury receipt was produced into court only on the 7th September 1909 (23rd Chingom 1084). From 24th Chin. 1084 to 3rd Kanni 1085 when the properties were delivered there was only a period of 12 days during which after the deposit the counter-petitioners were in possession of the lands decreed to the respondent and on this ground this respondent claimed the Kanni crops of 1085 as belonging to him overlooking the fact that the Kanni crops represented the interest on the mortgage amount and the cultivation expenses incurred in 1084. The Kanni crops were to be applied towards the interest on the mortgage for part of the year 1084 and the cultivation expenses for raising the crops in 1084."

C. V. Ananthakrishna Aiyar relied on *Ramalinga* v. *Samiappa*[1], *Champat Singh* v. *Jangu Singh* [2] and Broom's Legal maxims.

A. Narayana Sarma and *Mr. N. A. Krishna Aiyar* for Respondents.

There is no liability to account under S. 76 (*i*) or S. 84 of the Transfer of Property Act. Liability arises only from the time when we could have taken the money out of Court. This could not be done in this case till the notice of deposit was issued by the Court on the 11th and posted for hearing on the 15th for disposal. Possession was given to the appellant on the 17th.

Value of the crops and cultivation expenses had not been deposited and compensation is due to us for the same and

1. (1889) I.L.R. 18 M. 15. 2. (1912) 23 M.L.J. 788 (P.C.) S.C. 17 C.W.N. 793.

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we are entitled to continue in possession till actually evicted by due process of law under the terms of the original lease. See S.5 of the Malabar Compensation for Tenants Improvements Act. The fact that the preliminary decree does not provide, for, the same matters not, because under S. 6 Sub-clause 3 the Court executing the decree has to take this matter into consideration. Even before the passing of the Malabar Compensation Act the law was the same. Mortgagee is entitled to the increase and decrease found due on the date of actual eviction *Krishna Pattar* v. *Srinivasa Pattar*[1]. Revaluation even after decree can be asked for *Ramunni* v. *Shanku* [2]. Kanomdar is entitled to remove the trees planted by him *Vasudevan Nambudripad* v. *Valia Chathu Menon* [3]. Kanomdar has a right to remove the improvements effected by him *Angammal* v. *Aslami Sahib* [4].

All improvements for which compensation could not be claimed can be removed by the tenant, and the Court must also give him a reasonable time to do the same. S. 7 Malabar Compensation Act. Kanomdar is also a lessee. S. 3 of the Malabar Compensation Act, *Gopalan Nair* v. *Kunhan Menon* [5] where *Silapani* v. *Ashtamurthi Nambudri* [6], is approved and he is entitled to the emblements.

Kanomdar is entitled to the crops and not liable for mesne profits. S. A. 786 of 1912. He is not a trespasser after deposit of money. *Rukmani Bai* v. *Venkatesh* [7], 108 (*i*) Transfer of Property Act and *Deo Dut* v. *Ram Putar* [8], referred to.

The tenancy is of an uncertain duration, as we do not know when he may deposit the money and it is determind by an act of law. The crops represent the interest on our money. Mortgagor is not entitled to mesne profits after the deposit of the money. For accounting after tender see *Satyabadi Behara* v. *Harabati* [9], and *Ram Din* v. *Bhup Singh* [10].

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*:—The Kanom mortgagee while he is also a lessee (See S. A. 786 of 1912) has as lessee even higher rights than an ordinary lessee (*Vasudevan Nambudripad* v. *Valia Chathu Achan* [3].

1. (1896) I.L.R. 20 M. 124, S.C. 7 M.L.J. 159.
2. (1884) I.L.R. 10 M. 367.
3. (1896) I. L. R. 24 M. 47 (F. B).
4. (1911) 21 M. L. J. 891.
5. (1907) I. L. R. 30 M. 300.
6. (1889) I. L. R. 8 M. 382.
7. (1907) I. L. R. 31 B. 527.
8. (1886) I. L. R. 8 A. 502.
9. (1907) I. L. R. 34 C. 223 at 231.
10. (1908) I.L.R. 30 A. 225 at 230.

Narayanan Nambudri-pad v. Krishna Patter.

Sadasiva Aiyar J.

Following second appeal 786 of 1912 I would hold that paddy plants raised by a Kanom mortgagee judgment-debtor are improvements and if the respondents (mortgagee-judgment-debtors) had only the rights given them by the Malabar Improvements Act, they would be entitled to claim ¾ of the value of the plants if they were "sold by public auction to be cut and carried away."

But the principle embodied in section 108 clause (*i*) of the Transfer of Property Act which principle so far as my knowledge goes is also the common law of this country, allows to a lessee whose lease of uncertain duration determines by any means except the fault of the lessee, a right to carry away all the crops planted or sown by him. In the present case, the decree sought to be executed does not fix a certain date for the termination of the Kanom lease but merely allows the mortgagor-decree-holder to deposit the decree amount on *any* date between 23rd March and 23rd September 1909, and thus to put an end to the lease on that uncertain day between 23rd March and 23rd September. The lease thus became by the decree a lease of uncertain duration and the mortgagee-lessee was therefore entitled to reap the harvest raised by him and to appropriate the entire crops raised by him.

The cases quoted by the appellant's learned vakil as regards the rights of mortgagors and mortgagees who have not been given, by the statute or customary law of the country, the positions also of lessors and lessees are not relevant to the decision of this appeal.

The appeal is therefore dismissed with costs. Appeal against Appellate Order No. 123 follows.

Spencer, J.:—I feel a certain degree of hesitation in following the judgment in S. A. No. 786 of 1912 to which my learned brother was a party, because I doubt whether the words in S. 10 of the Malabar Compensation for Improvements Act (I of 1900) "plants spontaneously grown during the period of the tenancy or sown or planted" include annual crops such as paddy.

But I think in respect of growing crops the respondent is entitled to the benefit of the principles enacted in S. 108 (*i*) of the Transfer of Property Act seeing that a Kanomdar has certain rights usually belonging to lessees as well as those belonging to mortgagees.

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Spencer J.

It is true that S 117 of the Transfer of Property Act excludes agricultural leases from the operation of 108 except so far as the Local Government has by notification extended its provision to any particular area, but in *Vasudevan Nambudripad* v. *Valia Chathu Achan* [1], it was observed that a Kanom demise was not a purely agricultural lease and that rules in this Act which are founded on reason and equity might with propriety be applied to cases of this sort.

The provisions of S. 108 (*i*) are in accordance with the common law right by which a tenant for an uncertain period has under the name of emblements right to the benefit of growing crops of such species as ordinarily repay the labour by which they are produced within the year in which that labour is bestowed. Although a Kanom demise is usually for a fixed period of 12 years, the period is often, as in this case, exceeded and if the Kanomdar is left in any uncertainty as to the date when his rights may be redeemed, I consider that he holds under a lease of uncertain duration. In this case six months' time was given from the date of the appellate decree to pay the money for redemption which would extend the time till September 23rd 1909 but the crops were actually harvested on September 15, 1909; and the appellant was put in possession a few days later. *Ramalinga* v. *Samiappa* [2], which was cited by appellant's pleader was a case of a mortgagee in possession who claimed, the value of crops from an execution purchaser. The mortgagee in that case did not stand in the same position as the Kanomdar in the present case who had certain rights of a tenant as well as those of a mortgagee.

I agree that these appeals should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Iyer.

Manjunathaya — *Petitioner* * in Cr. R. C. No. 568 of 1912. (2nd accused.)

Subaraya Bhatta — *Petitioner* in Cr. R. C. No. 582 of 1913. (1st accused.)

v.

King Emperor

Manjunathaya v. Subaraya Bhatta.

Evidence Acts Ss. 26, 27—"Relates to discovery"—Statement that accused stole the money and the money was in a heap of rubbish—First statement inadmissible—Admissible to prove money to be stolen money—Production by the accused himself—Admissible, notwithstanding.

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1. (1898) I. L. R. 24 M. 47 at 56. 2. (1889) I. L. R. 13 M. 15.

* Cr. R. C. Nos. 568 & 582 and Cr.R.P. Nos 461 & 472 of 1913. 4th March 1914.

Manjunathaya v. King Emperor.

Where an accused person stated to the police that he stole the missing money and that it would be found in a heap of rubbish (close to his house) and immediately after went to the place and took out the coins,

Held that the statement that he stole the money was inadmissible but the other statement *viz.*, that the stolen money would be found in the heap of rubbish was admissible not only for showing that certain property was found in the rubbish but also for showing that that money was the missing money.

The fact that the articles were taken out by the accused himself and the Police did nothing towards the discovery does not make the statement one unconnected with the discovery and therefore inadmissible.

Queen Empress v. *Nana* (1) followed.

Petitions under Sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the judgment of the Joint Magistrate of Coondapur in Criminal Appeal No. 32 of 1913 preferred againt the judgment of the 2nd Class Magistrate of Coondapur in Calender Case No. 2 of 1913.

B. Sitarama Row, for the 2nd accused.

K. Yegnanarayana Adiga, for the 1st accused.

The Public Prosecutor (*C. F. Napter*) for the Government.

The Court made the following

Order :—Criminal Revision Petition 568 has been filed by the second accused Manjunathaya and Criminal Revision Petition 582 by the first accused Subaraya Bhatta. They were convicted under sections 461 and 380 of the Indian Penal Code on the finding that they broke open a closed copper dabbi buried in the store room of the Kamalashili temple situated in a village in the Coondapur Taluk. I may at once say as regards the second accused that there is no evidence worth the name that he committed theft of any coins from the dabbi of the temple which contained the cash and metal plate offerings made by the temple devotees. His confessional statement if it is admissible in evidence at all, merely shows that he received some coins from the first accused. This may be evidence of his having received stolen property but not of his having committed theft. His conviction and sentence must be set aside and his bail bond discharged.

Coming to the case of the 1st accused, his conviction is based upon the following facts, namely, that he told P. W. 1 sometime before the theft was discovered on the 6th June 1913 that as his pay had not been disbursed to him, he would steal the dabbi in which the offerings in cash and gold and silver trinkets are placed by the devotees of the temple. The evidence

1 (1888) I. L. R. 14 B. 260.

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of the Prosecution witnesses 6 and 7 proves that the 1st accused obtained from the Prosecution 6th witness in April 1913 the duplicate key of the room in which the dabbi was kept on some pretext the key was afterwards returned and that he had another key made for himself through the Prosecution witness 7 (a goldsmith) in accordance with the impression of a key made in wax and left with the prosecution 7th witness by the accused.

The evidence of the prosecution witnesses 1 to 5 proves that the 1st accused made the following statements: namely, that he and the 2nd accused stole the missing money from the dabbi, and that that stolen money will be found in a heap of rubbish close to his house. Then there is the fact that just after making these statements he went to that rubbish heap in the presence of two police constables and of the witnesses who made the search in his house and took out certain coins and metal plates similar to the coins and plates usually offered by the devotees and kept in the dabbi. On the above facts, the first accused was found guilty by both the courts below.

It is argued before me that the coins and the gold and silver pieces taken from the rubbish heap have not been identified with the coins and pieces which had been placed in the temple dabbi, that the statement of the first accused to the police that he stole those coins and pieces from the temple dabbi is not admissible in evidence as it was not connected with the discovery of the coins etc. in the rubbish heap, that that portion of his statement which signified that the coins and pieces found in that heap were properties stolen from the temple dabbi is also inadmissible in evidence as even that portion of the statement was not connected logically with the discovery of the properties in the heap, and that even if it could be held that that portion of the statement would have been logically connected with the discovery of these articles *if the police had themselves acted on that information and recovered the properties from the rubbish heap* it could not be connected with the discovery on the facts of this particular case, as the articles were taken by the accused himself from the rubbish heap and not by the police in consequence of that information.

As regards the first contention that the statement that he stole the articles is not admissible in evidence Mr. Adiga who appeared for the first accused is no doubt supported by all the

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cases. With the greatest respect to the Judges who decided those cases, I entertain some doubt on the question though my doubt is of very little practical consequence in the face of the dicta found in so many cases. Many departments of law are closely connected with the abstract sciences of metaphysics and logic, especially the department of the law of evidence. On the interpretation of sections 26 and 27 of the Evidence Act much logical acumen has been employed in many of the cases. As to whether a particular portion of an accused's confessional statement (a portion separable in idea though generally incapable of separation by taking apart some of the actual words used by the accused) can be said to be distinctly connected with the discovery of any particular fact, there has been much difference of opinion I should myself have held, if I were not bound by authority that any statement which forms a simple connected narrative leading naturally to the discovery of the stolen property is admissible in evidence and that only statements which are patently irrelevant to the discovery and which the police may be suspected to have introduced into the statement in order to fasten the guilt more securely on the accused were intended to be excluded by the Legislature as not connected with the discovery, especially as the Legislature distinctly contemplated that a direct confession of guilt might form part of the statement leading to the discovery (see the use of the expression in section 27 " Whether it amounts to a confession or not "). When the accused naturally says " I committed this theft " and I have concealed the stolen property in such and such a place " and then leads the police to the place where the stolen property is concealed and the property is discovered, I should think that the statement as to the whereabouts of the property is so naturally connected with the statement immediately preceding it that he stole the property that the latter statement might also form one of the statements which are admissible in evidence though made in the presence of the police. However, as I said, the authorities (one of the latest is *Sankappa Rai* v. *Emperor*) [1] seem to be clear on the point that a statement that the accused himself committed the offence is not admissible in evidence under circumstances similar to those in the present case.

Then as regards the other portion of the statement of the 1st accused namely that portion signifying that the property

1. (1908) I.L.R. 31 M. 127.

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stolen from the dabbi about which the police were then making an investigation will be found in the rubbish heap, I think that is a statement which is distinctly related to the discovery of the stolen property and is therefore clearly admissible. That statement sufficiently identifies the properties found in the heap with the temple properties stolen from the dabbi.

The fact that the rubbish heap out of which the stolen property was taken was in or near the accused's compound and that he took it there from also proves the possession of the stolen property by the accused. A man found in possession of stolen property soon after the theft can be presumed to be the thief. That he was the thief was also indicated as I said before by the evidence of the prosecution witnesses 1, 6 and 7. I cannot accept the argument that the fact that the police or somebody under the directions of the policc did not take the property from the place where the first accused said he had concealed it but the first accused himself took the property out of the rubbish heap indicates that the statement is not connected with the discovery and is therefore inadmissible in evidence. I agree with the decision of the Full Bench of the Bombay High Court (composed of Sargent *C. J.* and four other learned Judges) in *Queen Empress* v. *Nana* [1]. In that case it was held that though the accused himself took the property from the place where he had concealed it, it could be held without any violence to ordinary language that the property taken and produced by him was discovered in consequence of the statement which he made immediately before he took the property and handed it to the police. In the result, I dismiss the petition of the first accused and confirm his conviction and sentence.

He will surrender to his bail for serving the portion of the sentence remaining unserved.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, Chief Jurtice, and Mr. Justice Oldfield.

Rao Sahib T. Numberumal Chettiar — *Appellant.**

v.

Krishnajee — *Respondent.*

Numberumal Chettiar v. Krishnajee.

Letters Patent, cl 15—Order as to costs—Appeal from—Order incidental to judment—Interference in appeal, when meaning of judge's order not clear—Time taken by review petition—No deduction for—Limitation.

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1. (1889) I. L. R. 14 B. 260.

* O. S. A. No. 46 of 1912. 13th January 1914.

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An appeal lies under the Letters Patent from an order as to costs merely when that order is only incidental to a " judgment."

Manali Saravana Mudaliar v. *Rajagopala Chetty* (1) distinguished.

Where the trial judge made an order that the costs should follow the event but it was not clear as to how the learned judge intended the order to be worked out their lordships felt themselves at liberty to interfere with the order as the order as interpreted was not a proper order.

An appellant cannot claim deduction for the time taken by a review petition presented by him.

On Appeal from the Decree and Judgment of Mr. Justice Wallis dated the 28th day of March 1912 in the Ordinary Original Civil Jurisdiction of this Court.

M. K. Ramaswami Aiyar for Appellant.

Grant and Greatorex for Respondent.

The Court delivered the following

Judgment :—*The Chief Justice.*—In this case two preliminary objections were taken by Mr. Grant on behalf of the respondent to the hearing of the Appeal. The appeal is from a Judgment of Wallis J. sitting on the Original Side. The right of Appeal is created by clause 15 of the Letters Patent. Mr. Grant's first objection was that no appeal lay since this was an appeal from an order as to costs only. The learned Judge gave the plaintiff a decree for a certain sum and directed that the costs must follow the event. This is no doubt an appeal from an order as to costs only in the sense that the defendant only appeals from the judgment in so far as it directs that the plaintiff should have the general costs of the suit. It is not an appeal from a judgment or order which deals only with the question of costs. It is an appeal only as regards costs but it is not an appeal from an order as to costs only. For that reason it seems to me this case is distinguishable from the Full-Bench decision in *Saravana Mudaliar* v. *Rajagopala Chetty* [1]. There Sir V. Bhashyam Aiyangar in his judgment says "The order.................the subject-matter of the appeal is expressly restricted to costs." The order itself is set out in the judgment of Moore, J. and we have also looked into the records and the order was " This court makes no order on the application except as to costs." In the Full Bench case, assuming there was any adjudication, except as to costs, the adjudication to which the order for costs was incidental was not a " judgment " within the meaning of clause 15 of the Letters Patent, whereas in the case now before us it cannot be suggested

1. (1903) 17 M. L. J. 569.

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that the adjudication to which the order for costs is incidental is not a judgment within clause 15. It seems to me the case before us is distinguishable from the Full Bench case on this ground. No doubt the general rule is well settled in England. It is laid down in the case of *Metropolitan Asylum District* v. *Hill* [2] where Lord Blackburn refers to the rule that appeals shall not be brought merely for costs, or in relation to costs. Lord Watson says: "I quite concede the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing except the payment of costs." But in England the question is regulated by section 49 of the Judicature Act, 1873. That section says in so many words "No order made by the High Court or any Judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order." We have no corresponding statutory restriction on the right of appeal. In section 35 of the Code of Civil Procedure no restriction is to be found. Section 35 is not one of the sections of the Code the application of which to the High Court is excluded by Section 120. If we turn to section 96 we find an express provision that no appeals lie from decrees passed with the consent of the parties. That section is to the same effect as the provision with regard to consent in Section 49 of the Judicature Act 1873. There is no provision corresponding to the provision in the Judicature Act as regards appeals in cases of orders for costs. Section 96 is not one of the sections which are made inapplicable to the High Court. Of course the question as to whether, if at all, a Court of appeal should interfere with an order as to costs which are discretionary is an entirely different question. As regards the preliminary objection that in law no appeal lies from an order as to costs made in the circumstances in the order was made in this case, that is to say, as incidental to a " judgment " as regards that question I think our answer should be in the affirmative and that the preliminary objection should be overruled. The next preliminary objection was that the appeal was out of time. On the 28th March Judgment was delivered. The decree which was finally drawn up bears date 28th March. This is in accordance with the usual practice. In accordance with the usual practice the draft decree was furnished to the solicitors in both

2. (1880) L. R. 5 A. C. 582.

sides. The draft dealt with the direction as to costs on the footing that the plaintiff was to have the general costs of the suit. The defendant's solicitor objected and asked that the case might be posted on minutes of decree. On the 24th the case was posted but, for some reason or other which is not clear, by this time the decree, in the form of the draft to which the defendant's solicitor had objected, had been formally sealed and, to use the common expression, "issued". This same to the knowledge of the defendant's solicitor and he thought it wise to put in a review petition which he did on April 26th. On the 1st of May this review petition and also the draft decree which had been issued in the circumstances which I have stated came before the learned Judge. He made an order which is endorsed on the back of the draft decree in these terms. "The decree has been issued by mistake as, when it was posted to be spoken to last week, I expressly directed it to be posted again before me. It must be recalled and no decree passed until approved by me. Repost after Vacation". At the same time he made an order that the review petition should be reposted after the vacation. The review petition came before the learned judge on the 26th or 27th of July and the order made by the Judge was "Agreed to be taken as if decree had been drawn up. I have entertained some doubts as to the correctness of the order as to costs, but I do not feel at liberty to interfere under Order 47 as I doubt if there is sufficient cause within the meaning of the section". It has not been contended by Mr. Devadoss on behalf of the appellant that the time occupied in connection with the presentation of the review petition can be deducted from the prescribed period of limitation within which he had to present his appeal. The authorities as to this are against him.

11. I need refer only to *Govinda* v. *Bhandari* [1], *Ashanulla* v. *The Coltector of of Dacca* [2] and *Pundlik* v. *Achut.* [3] It is, however, contended that there was sufficient cause for not preferring the appeal within the prescribed period by reason of the events which happened. The order of the learned Judge on the 1st of May endorsed on the draft decree, as it seems to me, practically tied the hands of the appellant. He was entitled to deduct from

1. (1890) I. L. R. 14 M. 81. 2. (1888) I. L. R. 15 C. 242.
3. (1898) I. L. R. 18 B. 84.

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his period of limitation the time required for obtaining a copy of the decree. The learned Judge made an order that the decree should be recalled. I express no opinion as to whether the learned Judge had jurisdiction to make this order. In view of the order of the learned Judge that the decree was to be recalled it seems to me the appellant could not reasonably be required to present his appeal until some further order was made. I doubt whether in those circumstances he was entitled to present his appeal at all. The appeal was, in fact presented a day or two after the review petition was dismissed. The conclusion I have come to is that there was reasonable cause for non-presentation of the appeal within the prescribed period of limitation.

Now we come to the most difficult question in the case and that is, can we interfere with the order of the learned Judge as to costs, and if we can, ought we to interfere? As I have said, the learned Judge gave the plaintiff a judgment for a certain sum of money. His order as to costs was "I think under the circumstances the cost must follow the event." The words "must follow the event" have been construed in different ways. They have been construed as meaning that the event means the result and if the plaintiff succeeds he is to get the costs. They have been construed especially in cases of counter-claims as distributive. I do not propose to discuss the various English authorities which have been cited. They are in connection with Order LXV, rule 1 of the Rules of the Supreme Court. I only refer to *Hoyes* v. *Tate* [1] where it was held that in an action tried with a jury where there are separate issues and the plaintiff obtains a verdict and judgment, but the defendant is successful as to one of the issues, if the Judge makes no order with regard to that issue interfering with the incidence of costs under Order LXV, rule 1 the defendant is entitled to have the judgment drawn up so as to give him the costs of the issue on which he succeeds.

The question has been discussed in India. The only Indian authority to which I need refer is the judgment of Sir Lawrence Jenkins in *Parshram* v. *Dorabji* [2] an appeal from the original side. There the learned Judge says "An Appellate Court will not interfere with an exercise of discretion of a lower court unless it has proceeded on a manifestly wrong ground, such as

1. (1907) 1 K. B. 656. 2. (1898) 2 Bom. L. R. 254.

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the application of an erroneous principle or a misapprehension of the facts. So long as the discretion was in fact exercised, an Appellate Court will not interfere simply because it would itself have exercised the discretion differently." The learned Judge cites *Bew* v. *Bew* 1 in which it is laid down that "if the costs are in the discretion of the Judge the Court of appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised his discretion. For the purposes of to-day I do not want to attempt to lay down any general proposition as to what are the circumstances in which an appellate court should interfere, if it so desires, with an order as to costs where the order purports to be made in the exercise of the discretion vested in the judge. I do not want to suggest that I am not prepared to accept the proposition as laid down by Sir Lawrence Jenkins. But here we are dealing with a case in which the facts are of an unusual character. I think one is entitled to say, having regard to the history of this case, that it is not clear how the learned Judge intended his order as to costs to be worked out when he used the words, "the costs must follow the event." When the draft decree came before him for settlement (it was an accident that the decree had already been "issued") it seems clear from the terms of his order either that he thought that the draft decree did not carry out his intention as to how the order should be worked out, or at any rate that it was a matter for doubt as to how his order should be worked out. Otherwise it is impossible to understand why the learned Judge should have observed that the decree had been issued by mistake and that it should be recalled and that no decree should be passed until approved by him. When the matter was before him on July 26th or 27th for the purposes of the review application, there was an agreement that the decree should be taken as if it had been drawn up. That agreement was for the purposes of that application only and for the purpose of enabling the learned Judge to deal with the application to review and I think it may be said that the agreement was without prejudice to any question as to whether the decree as drawn up and, according to the learned Judge, issued by mistake, really embodied the learned Judge's intention. It is quite true that the learned Judge on the 26th or 27th of July had not an opportunity

1. (1899) 2 Ch. 472.

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of saying "the decree which you have agreed should be treated as having been drawn up does not represent my intention" and that he did not say so. It seems to me that is not conclusive when we consider that the learned Judge was then dealing with the question whether the case was one for review. He came to the conclusion that it was not a case for review because, as he puts it, he did not feel at liberty to interfere under Order 47 but he leaves on record the observation that he had doubts as to the correctness of the order as to costs. That, I take it, means that he had doubts as to the correctness of the manner in which the decree purports to work out his direction as to costs. Having regard to the special facts of this case I think it is open to us to consider the order as to costs as interpreted in the decree and that, if we come to the conclusion that the order, as interpreted, is not the order which should have been made I think we are at liberty to interfere.

The amount of plaintiff's claim is Rs. 22,700 odd. In paragraph 6 of the plaint the plaintiff gives credit to the defendant for a sum of Rs. 11,800 odd which he admits is due to the defendant as the price of certain timber supplied to him by the defendant. In paragraph 18 of the written statement the defendant pleads that after deducting certain items there remain due from him to the plaintiff a sum of Rs. 870-11-10. Among the items which the defendant says he is entitled to deduct is the balance of the price of timber supplied by the defendant. In his plaint the plaintiff puts this at Rs. 11,800 and odd. This amount as found by the Judge comes to Rs. 14,500 and odd. The defendant also sets up a counter claim for damages for alleged breach of contract. This the learned Judge dismissed. We have gone through the judgment of the learned Judge very carefully and we have also considered the correspondence between the parties. As regards the various items of the plaintiff's claim with one or two exceptions he failed to satisfy the learned Judge and the learned Judge held that the plaintiff had not made out his case.

Then there is a claim by the defendant for the price of timber sold by the defendant to the plaintiff which is dealt with by the learned Judge in the last paragraph of his judgment. On this the learned Judge gave judgment for the defendant for Rs. 14,500

and odd. It works out thus: the total amount claimed is Rs. 22,743; the amount for which the defendant admitted his liability though he did not make any payment into Court is Rs. 800 and odd and the amount for which the plaintiff finally gets a decree is Rs. 1220-10-4. The learned Judge dismissed the defendant's counter-claim with costs. The plaintiff will have the costs of the counter-claim.

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As regards the general costs of the suit the parties will pay their own. The respondent must pay the costs of this appeal.

Oldfield, J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ordinary Original Civil Jurisdiction.

Present:—Mr. Justice Bakewell.

Kuppammal minor by his next friend Thayasundarachari — *Plaintiff* *

Kuppanachari — *Defendant.*

Kuppammal v. Kuppanachari.

Hindu Law—Suit for restitution of conjugal rights—Ill health of the wife—Refusal by parents once to give custody—No defence.

Neither the ill health of the wife nor the fact that her parents had at one time refused to give the husband the custody of the wife is a defence to a suit for restitution of conjugal rights brought by the wife.

V. Visvanatha Sastri for Plaintiff.

G. Krishnaswami Iyer for Defendant.

The court delivered the following

Judgment:—This is a suit by a wife for restitution of conjugal rights. The plaintiff was 12 years of age at the date of the presentation of the plaint on 4-8-13 and sues by her father as next friend. It is alleged by the defendant that the parents of the girl in April last resisted his attempt to obtain possession of his wife on the ground that her health did not permit of their cohabitation, and he now maintains that she has not proved that her health has been re-established or that she is able to cohabit with him. It appears that the spouses have never lived together. I think it is clear that ill-health of a wife is no ground for the refusal of the husband to give her his protection and afford her the shelter of his house, and that the defendant is bound to do so notwithstanding that the wife may not be able to afford him all the rights of a husband.

* C. S. No. 186 of 1913. 3rd February 1914.

Kuppammal v. Kuppanachari.

The fact that the parents of the girl at one time refused to give him the custody of the child is no reason why he should now refuse to perform his duty.

I think that the written statement discloses no defence and there will be a decree that the defendant do receive the plaintiff into his house as his wife and pay the costs of this suit. There will be no order as to jewels; as the guardian of his wife defendant will be entitled to have the custody of them.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ordinary Original Civil Jurisdiction.

Present:—Mr. Justice Wallis.

K. Tiruvangadial *Plaintiff.*

R. Chinnaswamian and others *Defendants.*

K. Thiruvangadiah *Attaching creditor.*

K. Tiruvengadial v. K. Tiruvengadiah.

Civil Procedure Code (Act V of 1908) S. 73—Order 21, R.52—Fund in Court attached by several decree holders—Not rateable distribution, but payment in order of attachment—Attachment of money after decree for sale before payment of money into Court—Invalid.

S. 73 C. P. C. has no application to a case where a fund in Court is attached by several decree-holders. They have not to share rateably as under the section but are entitled to be paid in the order of their attachments.

An attachment under order 21, r. 52 after a decree for sale but before any money is realised and paid into Court is invalid and confers no right on the attaching creditor.

V. V. Srinivasa Aiyangar and *T. Rajagopalachariar* for Plaintiffs.

P. V. Doraisawmi Mudaliar for Defendant.

The Court delivered the following

Judgment:—I think that as regards the claim to rateable distribution this case is governed by the decision of the appellate Court in O. S. A. 22 of 1909 (unreported). In that case there were numerous attachments from the Small Cause Court of a fund in Court and I directed the first attaching creditor in point of time to be paid in full and disallowed a claim for rateable distribution by the other attaching creditors. The appellate Court affirmed this order merely remarking that: "The fact that a fund is attached by a Court does not constitute the fund 'assets held by' that Court within the meaning of S. 73." I hold therefore that the 1st attaching creditor is entitled to be paid in full out of their fund. The fund in Court consists of the surplus sale proceeds payable to the defendant mortgagor after sale under a mort-

* C. S. No. 116 of 1911. 23rd April 1913.

K. Tiruvengadial v. K. Tiruvengadiah.

gage decree. The money was paid into Court by the auctioneers on 27—3—13 and was subseqqenty attached at the instance of the present applicant. The attachment at the instance of the opposing creditor was made before the money had been paid into Court and therefore before there was any property in the custody of the Court within the meaning of Order 21, Rule 52, and was therefore bad. *Tulaji* v. *Balabhai* 1 It has been argued that as this attachment was made after the decree for sale of the mortgaged property the provisions of the rule are satisfied, but I am unable to accept the contention, as "the property to be attached within the meaning of the rule in this case was this particular fund and this was not in the custody of the Court at the date of the attachment in question. Payment out as prayed with costs against the opposing creditor.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Srinivasachariar — *Appellant** (*Petitioner.*)

Gopalan minor by his father and Guardian Ramasami Aiyangar and another — *Respondents* (*1 and* 2)

Srinivasachariar v Ramasami Aiyangar.

Succession certificate—Question whether debts due to the deceased—Not open in application for.

The question whether the debts belonged to the deceased is not a matter that can be gone into on an application for succession certificate.

Bai Kashi v. *Parbhu Keval* (2) followed.

Radha Rani Dasi v. *Brindabun Chandra* (3) dissented from.

Appeal from the order of the District Court of Chingleput in succession certificate petition No. 25 of 1912.

K. S. Jayarama Aiyar for *G. S. Ramachandrier* for the Appellant.

M. O. Parthasarathy Iyengar, *V. S. Govindachariar* and *Kallabhiran Iyengar* for the 1st Respondent.

P. R. Srinivasa Iyengar for the 2nd Respondent.

The Court delivered the following

Judgment:—The judge has dismissed the petition on the ground that the debts in respect of which the cert ficate is prayed

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* C. M. P. No 13 of 1913. 18th February 1914.

1 (1896) I. L R. 22 B. 89. 2. (1903) I L. R. 28 B 119.

3. (1897) I. L. R. 25 C. 320.

Srinivasachariar v. Ramasami Aiyangar.

for did not form the property of the deceased but very probably they belong to one of the persons who oppose the grant of the succession certificate to the appellant. We are of opinion that the question whether the debts belonged to the deceased is not a matter to be decided on this application. We agree with the decision in *Baikashi* v. *Parbhu Keval* [1] which has been followed in A. A. O. No. 42 of 1906 by Benson and Wallis JJ. We are unable to agree with the opinion of the Chief Justice to the contrary in *Radha Rani Dassi* v. *Brindabun Chundra Basack* [2]. The order of the Lower Court is therefore reversed and the District Judge is directed to restore the application to his file and dispose of it according to law. Costs hitherto incurred will be provided for in the final order.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ordinary Original Civil Jurisdiction.

Present:—Mr. Justice Bakewell.

Chundra Guruviah and another — *Plaintiffs.* *

Guggilam Kotiah and another — *Defendants.*

Guruviah v. Kotiah.

Debtor and creditor —Composition—Arranged by some creditors —Others not agreeing—None bound.

Where a few of the creditors, without authority from the general body of creditors, arranged with the debtors that a certain portion of the assets should be set apart for the satisfaction of all the creditors in Madras and the balance for the satisfaction of the moffussil creditors and an agreement was also drawn up in accordance with the arrangement making all the creditors parties but some of the creditors failed to agree and recovered their claims in full

Held that under the circumstances the proper inference to make was that no creditor agreed to be bound unless all agreed and in the absence of general consent even the signatories were not bound.

A. Suryanarayaniah for Plaintiff.

V. Visvanath Iyer for Defendant.

The Court delivered the following

Judgment:—The defendants carried on business in Cheerala and at Madras and in the beginning of 1912 found themselves in difficulties. Five or six persons representing the Madras creditors went to the defendants at Cheerala, looked into their accounts, ascertained what assets they had and proposed a means of paying off their liabilities. It was arranged that certain assets shall be set apart to satisfy the claims of the Madras creditors and certain

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* O. S. No. 421 of 1912. 12th February, 1914

1. (1903) I. L. R. 28. B. 119. 2. (1897) I. L. R. 25 C 820.

other assets should go to the mofussil creditors. An agreement Ex. I dated the 21st May 1912 was drawn up to which all the Madras creditors were made parties, and in a list of the same persons, Ex. II, the details of their claims and the total amount are set out.

The persons who arranged this agreement were evidently under the impression that if they did the best they could for their fellow-merchants, the latter would be sensible enough to fall in with the arrangement. They seem to have taken no steps before they left Madras to obtain the concurrence of the other creditors, but to have been satisfied that the arrangement they proposed would be so eminently satisfactory that it could not fail to be accepted by the other creditors of the defendants' firm. The whole of the wording of the agreement is consistent with these facts, and shows, I think, that none of the parties who arranged it doubted that all the creditors would fall in with the arrangement and sign the agreement. The steps taken subsequent to the agreement were very informal. No meeting of the creditors seem to have been called ; the parties seem to have done what they thought right in their own eyes with regard to the realization of the defendant's property ; there was an informal alteration of the agreement, Ex. I, with regard to interest ; and it is clear that the whole body of creditors were never formally consulted. The consequence of this informal action was that some of the creditors thought that they would try to get the whole of the claim by taking proceedings on their own account. They brought suits and part of the property included in the agreement was attached. The plaintiffs now claim that the consideration which they obtained under the agreement has failed and sue for the whole amount of their debt.

I do not believe the 1st plaintiff when he says that there was an express stipulation on his part that all the creditors should sign. I think, on the facts of the case and the wording of the agreement, that no one contemplated that any creditor would be so filled up with greed as to refuse assent to it. This, I think, implies that a party should not be bound unless all the creditors consented. It is evident that, if one creditor has chosen to claim the total amount of his debt, the property divisible amongst the rest must be *pro tanto* diminished and the consideration for the contract must fail. I think the case falls within the principle

Guruviah v. Kotiah. —— Bakewell J.

laid down in the decision of their Lordships of the Privy Council in *Ajudia Prasad* v. *Sidh Gopal.* [1] I hold therefore that the plaintiffs are not bound by the agreement and are entitled to claim the whole amount of their debt. The alleged arrangement that a sum said to be due by the 2nd plaintiff to the defendant should be included in the agreement. There must be a decree for the whole amount claimed by the plaintiff *viz.*, Rs. 4211—9—0 with interst at 6 per cent till payment and costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar.

Gontla Venkata Pitchayya *Petitioner.*

Sowdagar Mahomed Abdul Kareem Beg Saheb and others *Respondents.*

Pitchayya v. Mahomed AbdulKareem

Civil Procedure Code (Act V of 1908)—O. 9, R. 13—O. 5, Rr. 17, 19—Service by affixture—Process server not stating date of defendant's return, indefinite—Inference from circumstances—Admissible—C.P.C.S. 115—No interference under—Charter Act S. 15—In gross case, High Court might interfere.

When the process server went to serve the defendant (a resident of Bezwada), his gumasta said that he had gone to Tirupathi and so the summons was affixed on the outer-door of his house. The Munsif examined the process-server and declared the service sufficient. It was contended that as the process server did not say that the date of the defendant's return was not known or was indefinite, the service was not duly made.

Held: overruling the contention that it was open to the court to make the inference from the circumstances and to declare the service proper.

Held further that, two courts having agreed in holding that the service was proper and refused to set aside the *exparte* decree, the High Court could not interfere with the order in revision under S. 115, the error if at all being only an error of law.

Semble. In a case of patent and extreme hardship the High Court might interfere under the Charter Act.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Kistna in Mis. Appeal No. 5 of 1911 preferred against the order of the Court of the Principal District Munsif of Bezwada in Mis. Petition No. 1921 of 1910 in O. S. No. 360 of 1910.

P. Narayana Murthi for Petitioner.

Hon'ble The Advocate General (F.H M. Corbet) and *P. Nagabushanam* for Respondent.

The Court delivered the following

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* C. R. P. No. 588 of 1911. 11th February 1914.

1. (1887) I. L. R. 9 A. 330.

Pitchayya v Mahomed AbdulKareem

Sadasiva Aiyar J.

Judgment :—The first defendant is the petitioner in revision. An *ex parte* decree was obtained by the plaintiff against the petitioner for specific performance of an unregistered written agreement by which the defendants agreed to execute a registered rent deed in favour of the plaintiff. This *ex parte* decree was passed on the 16th August 1910. The first defendant was not personally served with the defendant's summons in the suit. His permanent residence was Bezwada and the suit was brought in the Bezwada Munsif's Court. When the process server went to serve him with the summons on 2nd July 1910, 1st defendant's gumastah said that the 1st defendant had gone to Tirupathi and so the duplicate summons was affixed to the outer door of his house. The process-server was solemmly affirmed on the 5th July 1910 and deposed to the truth of his return to the above effect. The District Munsif treated the service by affixture as service duly made and after examining one witness for the plaintiff who proved that the unregistered agreement was executed by the 1st defendant gave a decree against the 1st defendant (decree was also passed against the other executant of the agreement, the 2nd defendant, but we are not concerned now with that matter).

When the suit for the specific performance, (O. S. 360 of 1910) was brought, the law in Madras seems to have been that an unregistered agreement to execute a rent-deed could be used and was admissible as evidence in a suit for specific performance of that agreement. (See *Srinivasacharlu* v. *Venkatarazu* 1) The fact that in February 1910, *Benson and Krishnasami Aiyar, JJ.* had doubted the correctness of that decision and had referred the matter to the Full Bench (See *Narayan Chetty* v *Muthia Servai* 2) was probably not known in the mofussil then. The District Munsif therefore on 16th August 1910 treated the unregistered agreement on which the suit 360 of 1910 was brought in his court for specific performance as admissible in evidence and passed his *ex parte* decree on that date. On the 23rd August 1910, the 1st defendant put in a petition to the District Munsif to set aside the *ex parte* decree on the ground that he had gone on a pilgrimage to Benares in May 1910, that he returned to Bezwada only about the 13th August 1910, that he did not then know of the suit having been brought against him, that the *ex parte*

1. (1907) 17 M. L. J. 218. 2. (1910) 21 M. L. J. 44. S.C. I.L.R. 35 M. 63.

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decree of 16th August 1910 which was passed about 3 days after he returned to Bezwada came to his knowledge only on the 22nd August 1910 and on these grounds he applied to set aside the *ex parte* decree. This petition was dismissed by the learned District Munsif on the ground that the 1st defendant must have been informed by his clerk of the affixing of the summons in July to the outer door of the 1st defendant's house, that the District Munsif did not believe the allegation in the first defendant's affidavit (that the 1st defendant had gone to Benares) because the endorsement on the summons shewed that he had gone only to Tirupati and that the 1st defendant had signed " the suit agreement ". On appeal, the learned District Judge confirmed the order of the District Munsif refusing to set aside the *ex parte* decree. The learned District Judge's reasons are that the 1st defendant who was absent when the process-server took the summons for service to his house was not temporarily absent but was absent for an indefinite period and that the service by affixture was correctly effected in such a case and could be treated as due service. It was argued in this C. R. P. 558 before me that the endorsement of the process server itself shows that the 1st defendant was not duly served, (see the 2nd ground of the petition) and that "the Court below failed to see that the plaintiff's suit was not maintainable on the face of it as no suit could be brought on the basis of an unregistered agreement to lease. [Vide Full Bench decision in ***Narayana Chetti*** v. ***Muthiah Servai*** [1] (see the 5th ground of the Revision petition]. This case ***Narayana Chetti*** v. ***Muthiah Servai*** [2] was decided on 3rd November 1910, the reference to the Full Bench having been made by Benson and Krishnasami Aiyar JJ as I said before on the 8th February 1910. This ground of the Revision petition lends some support to the arguments of the learned Advocate General (who appeared for the respondent in this case) that the 1st defendant knowing of the suit, allowed it to be decreed *ex parte* on the 16th August 1910 as he was ignorant of the fact that the decision in *Srinivasacharlu* v. *Venkataraju* [3] had been doubted by a Bench of this Court in February 1910 and that the matter had been referred to a Full Bench, that he, (1st defendant) after 16th August 1910 came to know of the fact and that

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1 (1910) 21 M. L. J. 44 S. C. I. L. R. 35 M. 63.

2. (1911) 21 M. L. J. 978.

3 (1907) 17 M. L. J. 218.

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thereupon he put in a petition on the 23rd August 1910 to set aside the *ex parte* decree. (The decision in *Narayana Chetti* v. *Muthia Servai* [1] has also been reported in the authorised reports See I. L. R. 35 M. 63.)

The argument of the learned Vakil for the petitioner before me was that as the process-server has merely stated in his return that the 1st defendant (petitioner) was alleged to have gone to Tirupati and as the process-server did not add that the date of the 1st defendant's return to Bezwada was not known or was indefinite, the service was not duly made and that under Order IX, R. 13 he (1st defendant) was entitled to have the *ex parte* decree set aside when the summons was not duly served. He relies upon several cases, one of which is *Abraham Pillai* v. *Donald Smith* [2]. That case in *Sakima* v. *Gauri Sahai* [3] goes, however too far and has been doubted in *Visvanathan Chetti* v. *Arunachellam Chetti* [4] and it is also the decision of a single learned Judge. *Visvanathan Chetti* v. *Arunachallam Chetti* [4] follows *Sankaralinga Mudali* v. *Ratnasabapati Mudali* [5] in which it was held that if the absence of the defendant is for an indefinite period, service by affixture was sufficient. Whether the absence was for an indefinite period or not, has to be ascertained from the circumstances of the particular case. The learned vakil (Mr. P. Narayanamurti) for the petitioner contends that unless the process-server's return expressly shews that the person who gave the information to the process-server of the absence of the defendant from his usual place of residence is stated in the return itself to have added that the date of the return of the defendant to his usual place of residence is not known the court could not legally accept the service as due service. I am unable to accept this contention. The court might find the indefiniteness of the period of absence not only from the express words in the return (if there are such express words) but also from the other circumstances as appearing from the return. In the case in *Sankaralinga Mudaliar* v. *Ratna sabapati Mudali* [5] in which it was held that the Subordinate Judge was justified in declaring the defendant as duly served with summons on the basis of the process-server's return, I find on

1. (1910) 21 M. L. J. 44 S.C. I. L. R. 35 M. 63.
2. (1896) I. L. R. 20 M. 324.
3. (1903) I. L. R. 24 A. 302.
4. (1911) 21 M. L. J. 978.
5. (1897) I. L. R. 21 M. 324.

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looking into the printed records that the process-server merely said in his return that "The families of the said person's house and the owner of the neighbouring houses say that it was two days since the defendant went to Tinnevelly," and that he (the process-server) therefore affixed it to the street-door. In the present case the information that the 1st defendant, a resident of Bezwada had gone on a pilgrimage to Tirupati and not to a neighbouring village reasonably led to the presumption that his absence was indefinite as the District Judge points out. If the 1st defendant's case is true that he had left Bezwada on a pilgrimage to Benares a month before the summons was affixed to the outer door, the presumption is still stronger that his absence was for an indefinite period. Following *Sankaralinga Mudali* v. *Ratnasabapati Mudali* [1] I hold that the Munsif was justified in declaring that 1st defendant was duly served and in passing an *ex parte* decree against the 1st defendant (petitioner). In *Sitaramasawmi* v. *Kolandi Patra* [2] where the defendant had left the jurisdiction of the court (as in this case) it was held that the affixing of the summons to the outer door of his house could be rightly held by the court as due service. In that case also there was no express statement by the process-server that the date of the return of the defendant from Vizagapatam (to which he had gone) from his usual place of residence, (in Cuttack) was not known and yet it was held that service by affixture could be legally held to be sufficient. In *Sitaramaswami* v. *Kolandai Patro* [2] reliance was placed for the defendant upon the observations in *Sakina* v. *Gauri Sahai* [3], *Sakharam* v. *Padmakar* [4] and *Abraham Pillai* v. *Donald Smith* [5] (just as these decisions were relied on by the Petitioner's Vakil in this case) but as pointed out by *Mookerjee J.*, and *Carnduff J.* "In some of these cases the rule was too broadly stated and it may be a question whether the decision in every one of these cases can be justified by the most liberal interpretation of Rule 17" *Sitaramaswami* v. *Kolandai Patro* [2] followed *Sankaralingam Mudali* v. *Ratnasabapathi Mudali* [1] and I also propose to follow that case in preference to other cases. Lastly this is a petition for revision under S. 115, and I am very doubtful

1. (1897) I. L. R. 21 M. 324.
2 (1912) 17 C. W. N. 999.
3. (1903) I. L. R. 24 A. 302
4. (1906) I. L. R. 30 B. 623.
5. (1906) I. L. R 29. M.324.

whether even if the lower Courts were wrong in their law that service under these circumstances by affixture was due service, whether they could be considered as having acted without jurisdiction or illegally or with material irregularity. I am inclined to doubt the correctness of the decision in *Wajir Khan* v. *Nagnawar* [1] which held that interference in revision can be properly made in such a case. Of course, in a case of patent and extreme hardship, the powers under S. 15 of the Charter Act could be invoked and used by this Court.

Pitchayya v Mahomed AbdulKareem

Sadasiva Aiyar J.

In the result this Civil Revision Petition is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair.

A. S. P. L. Vr. Veerappa Chetty... *Petitioner* in all* (*Plaintiff in all*).

Mudali and others *Respondents.*

Veerappa Chetty v Mudali.

Estates Land Act (Madras Act I *of* 1908). *Sec* 8 *Cl* (1) (2) (3) (4). *Ss.* 77, 189—*Suit by landholder purchasing Kudivaram before the Act, for rent–Not cognisable by Civil Court—S. 8 Cl.* (4)*not applicable to tenants not let into possession after the Act.*

As, under S. 8 Cl. 3 of the Estates Land Act, merger of the occupancy right by transfer or succession under Cls (1) & (2) has not the effect of converting ryoti land into private land, a suit for rent even by a landholder who had become the purchaser of the occupancy right before the passing of the Act can be brought only in Revenue Courts.

The benefit of S 8 Cl 4 does not avail against tenants who were not let into possession after the Act was passed but were in possession before and at the time of the passing of the Act.

Petitions under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Ramnad dated 21st August 1911 in Small Cause Suit Nos. 237 to 256 of 1911.

The plaintiff as owner of the village of Puduvayal situated in the Sivaganga Zemindari brought these suits for arrears of rent against the defendant therein in the Subordinate Court, Ramnad on the ground that his predecessors in title had purchased the kudivaram right of the tenants that they were only cultivating tenants, and consequently the Revenue Court had no jurisdiction to entertain these suits. It was admitted in these

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* C.R. P. 591 to 610 of 1911 — 27th Oct. 1912

1. (1909) 6 A. L. J. 45

Veerappa Chetty v. Mudaly.

Sankaran Nair J.

suits that the tenants were in possession on the 1st July 1908. The Temporary Subordinate Judge of Ramnad before whom the suits came on for hearing held that the Madras Estates Land Act applied to the case and ordered the plaints to be presented to the Revenue Court. Against that order, Civil Revision Petitions were preferred to this Court.

S. Sundararaja Iyengar for Petitioner.

The Court delivered the following

Judgment:—The Subordinate Judge has held on the admitted facts that the suit is not cognisable by a Civil Court.

It is argued before me that this is private land and therefore according to S. 19 of the Madras Estates Land Act the provisions of the Act that the landlord may bring suits before the Collector [S. 77 (1),] and that such suits are exempted from the jurisdiction of the Civil Courts [S. 189] do not apply.

Plaintiff alleges in his plaint that his predecessors purchased from the tenants the Kudivaram right and was in possession of it. It is contended that he thereby became absolute owner of the property which must for this purpose be therefore treated as his private land.

Under S. 8 Clause (3) merger of the occupancy right by transfer or succession under clauses (1) and (2) has not the effect of converting ryoti land into private land. But under clause (4) in cases where such merger takes place by transfer for valuable consideration before the passing of the Act the landholder has the right of admitting any person to the possession of the land on terms that may be agreed upon between them.

In this suit it is true the plaintiff alleges purchase of the Kudivaram right and he may have the right of letting in a tenant within twelve years of the passing of this Act, if he legally dispossesses the tenant now in possession. The tenant so let into possession will not have any occcupancy right conferred by S. 6 or the right to acquire the same under S. 46. Their rights and obligations will be regulated by the contract. Even in that case there is no provision that the land becomes "private land" according to the definition.

But the defendants were tenants not let into possession after the Act was passed. It is admitted they were in possession

before and at that time. They do not come therefore within the provision of S. 8 clause (4).

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Not being private land and the plaintiff being clearly a landholder, S. 19 does not, and sections 77 (1) and 189 do apply.

I dismiss the petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair, and Mr. Justice Ayling.

M. A. Sreenivasa Aiyangar *Appellant* (Petitioner Plaintiff).*

v.

Cundasami Naicker and another *Respondents.* *(Respondents—Defendants).*

Sreenivasa Aiyangar v Cundaswamy Naiker.

Civil Procedure Code, O. 34, R. 6—No right to proceed under, without bringing mortgaged property to sale—may proceed against judgment-debtor selling property in part satisfaction.

A mortgagee decree—holder cannot proceed against the judgment-debtors personally under O. 34, R. 6 before bringing the mortgaged property to sale. But where after the decree one of the judgment-debtors had sold the property to the decree holder in part satisfaction of the decree *Held* that he could proceed against the judgment-debtor who had so sold the property to him for the balance after giving credit for the purchase money though he could not as against the other judgment debtor who had not consented to the sale.

Appeal from the order of the Madras City Civil Court dated the 31st March 1913 on C. M. P. No. 324 of 1913 in O. S. No. 20 of 1912.

T. Narasimha Aiyangar for Appellant.

R. N. Aiyngar for Respondent.

T. Narasimha Aiyangar.—S. 90 of T. P. A. Act applies even if the sale was not through Court but was only a private sale with the consent of the judgment-debtor. *Udit Narain Singh* v. *Baggar Sajjad* [1] At a Court sale the expenses of sale will have to be deducted and the rest alone will be applied towards the decree. Here the expenses will be a saving to the judgment-debtor.

Similarly in *Gajadhar Lal* v. *The Alliance Bank of Simla Limited* [2] 'such sale' has been construed to be a sale of the property directed to be sold by the decree *Shiam Sunder Lal* v. *Ganesh Prasad* [3]. In the present case sale through Court was about to take

* A. A. O. No. 200 of 1913 5th February 1914.

1. (1905) 2 A. L. J. 358. 2. (1906) I. L. R. 28 A. 660 at 668.

3. (1906) I. L. R. 28 A. 674.

Sreenivasa Aiyangar v. Gundaswamy Naiker.

place when the judgment-debtor requested for the postponement of it for holding a private sale at its highest value. All that has been done.

R. N. Aiyngar.—In one of the Allahabad cases the sale was by private auction and not by private sale. In the other the sale was by an English Court. In the Allahabad case the sale amount was certified to the Court (Order 21, R. 2 (3). Here it was not. In those cases estoppel was the ground of decision. Here there is none at least against me.

The Court delivered the following

Judgment:—The City Civil Judge has dismissed the application of the plaintiff for a personal decree against the 1st and 2nd defendants under O. 34, R. 6 of the Code of Civil Procedure on the ground that the plaintiff failed to bring the mortgaged property to sale in execution of the decree under Order 34, R. 5 of the Code of Civil Procedure obtained by him. The 1st defendant privately sold the property to the decree-holder for Rs. 500/ which in his application for a decree for the balance under Order 34, R. 6 he has credited towards the decree amount.

Order 34, R. 5 directs the sale of the mortgaged properties and the application of the sale proceeds in the manner indicated therein and it is only where the net proceeds are found to be insufficient to discharge the decree debt that the plaintiff is entitled to ask for a decree under R. 6. These provisions no doubt contemplate a judicial sale for the decree amount and a decree for the balance. But it is clear that it is open to a judgment-debtor to stop the sale by payment of the debt or by adjustment duly certified to the Court. Such adjustment may be made by a private sale. Nor is there any reason for not recognising a payment in part or a partial adjustment as between the parties thereto. The 1st defendant who sold the property does not dispute the plaintiff's claim; so far as he is concerned the sale in our opinion should be recognised and it follows that the plaintiff is entitled to a decree against him for the balance.

So far as the 2nd defendant is concerned the sale is not binding on him. He is entitled to insist upon the procedure prescribed by the Code of Civil Procedure being followed. He is not a party to the sale and his right to apply for the execution

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of the decree under Order 34, R. 5 cannot be taken away by the sale of property by the 1st defendant. No decree therefore can be passed against him under R. 6. In the cases cited, the contesting judgment-debtor was a party to the sale and in the case in *Udit Narain Singh* v. *Bagar Sajjad* [1] after the private sale, there was a Court sale for the *balance*. They have no application to this case so far as the 2nd defendant is concerned. We confirm the order and dismissing the appeal as against the 2nd defendant with costs. We reverse the order so far as the 1st defendant is concerned and direct the City Civil Judge to restore the application to his file and dispose of it according to law. The costs will be provided for in the final order or decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Full Bench Arnold White, Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

P. C. Manavikrama Zamorin Raja Avergal (L. R. of 1st appellant deceased. } *Appellant *Defendant and his L. R*),

R. P. Achutha Menon. *Respondent. (Plaintiff)*.

Manavikrama Raja v. Achutha Menon.

Limitation Act, 2nd Schedule Art 131—Declaratory suits, whether confined to—suits to recover sums due under a periodically recurring right—Applicability.

Art. 131 of the 2nd Schedule of the Limitation Act is applicable to suits to recover sums due under a periodically recurring right whether there is a prayer for declaration of plaintiff's right or not.

Held, accordingly, that a suit for recovery of arrears of Adima allowance for a period of 8 years was not barred in respect of any portion of it.

Second Appeal from the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 997 of 1910, preferred against the decree of the Court of the District Munsif of Alatur in S No. 383 of 1909.

T. R, Ramachandra Aiyar for Appellant.

T, L. Rasama for Respondent.

The Court (Ayling and Tyabji JJ.) made the following order of reference to a Full Bench.

Ayling, J:—This was a suit for recovery of arrears of 'adima' allowance for a period of 8 years with interest. The District Munsif decreed the claim for 3 years only, holding the

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* S. A. No. 1972 of 1911. 16th January 1914.

1. (1905) 2 A. L. J. 358, † 26th September, 1913.

Manavikrama Raja v. Achutha Menon.

rest of it to be barred by limitation, and gave interest at 10 per cent from date of demand. The Subordinate Judge held that no part of the claim was time-barred and gave a decree for the allowance at the rate fixed by the District Munsif for the full period claimed, with interest at the same rate. Against this, the defendant appeals.

The first point argued before us relates to the rate of allowance and the award of interest. In neither respect do we see reason to interfere. In our opinion the evidence on record, though meagre, in the absence of anything to contradict it, justifies the findings of lower Courts as to the rate of allowance: and we are not disposed to inferfere with the discretion of the lower Courts as to the award of interest or the rate thereof.

The only other point is that of limitation. The District Munsif held the suit to be governed by Article 115 of Schedule II of the Limitation Act, while the Subordinate Judge considers Article 131 to be the one applicable. We may say at once that in our opinion Article 115 (for compensation for breach of contract etc.,) certainly cannot be applied. The adima allowance is described in the plaint as due to the plaintiff's tarwad from time immemorial: and even if we accept appellant's contention that Exhibit A is the original grant, (which does not appear to be the case) it is still a case of grant, and not of contract. If Article 131 does not apply, the suit must be governed by Article 120.

The real question is, however, whether Article 131 applies: and on this point there appears to have been considerable difference of opinion in different courts. The Article runs thus:—

131.	To establish a periodically recurring right.	Twelve years.	When the plaintiff is first refused the enjoyment of the right.

In the present case it is not denied that the right to the adima allowance is a periodically recurring one: but Mr. Ramachandra Aiyar argues that this suit is not one for the "establishment" of the right: but for the recovery of amounts due under the right. He contends that the article only applies to suits brought for a declaration of a periodically recurring right: and points out that the plaint in this case contains no prayer for a a declaration, but asks for a decree for payment of a specified amount, being the arrears of the adima allowance.

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Our attention is invited to articles 128 and 129: where a distinction is drawn between a suit for a declaration of right to maintenance, and a suit for arrears of maintenance. According to the appellant's contention the phrase used in Article 131 "to establish," is equivalent to that in article 129 "for a declaration of the right". Respondent argues that the phrase "to establish" is intended to cover both classes of suits. We should be more inclined to adopt this view if the word used had been "*to enforce*."

On a consideration of the various articles in the schedule we should be disposed to hold article 131 to be inapplicable: but our attention has been drawn to a series of rulings of this Court in support of the contrary view: *Ramnad Zemindar* v. *Dorasami* [1] *Ahubi* v. *Kunhi Bi* [2] *Balakrishna* v. *The Secretary of State for India* [3], and *Ratnamasari* v. *Akilandammal* [4].

The first of these *Ramnad Zemindar* v. *Dorasami* [1] calls for little remark inasmuch as the decree which was the subject of appeal before the Court was merely one declaring the Ramnad Zamindari liable for a certain periodical payment, and not for any consequential relief.

In the next case, however *Ahubi* v. *Kunhi Bi* [2], the suit was not for a declaration of a recurring right, but for recovery of the actual amount payable thereunder, and the learned Judge said "We think plaintiff is entitled to recover 12 years rent or revenue up to date of suit under Article 131 as a recurring right, and also under Article 132 as money charged on land." This is a clear expression of opinion on the point now at issue; and all that can be said is, as there was a charge in that case, and Article 132 applied, it was unnecessary for the decision of the case to consider whether Article 131 also applied.

The next case is *Balakrishna* v. *Secretary of State for India* [3]. This was a suit not for money, but "to establish plaintiff's right to certain yearly remissions and to have it declared that Government is not entitled to levy full assessment without granting those remissions." The learned Judges held that Article 120, and not Article 131, applied. They said: "Article 131 applies only to those suits in which a decree for consequential relief is asked for by virtue of the periodically recurring right, and in the

1. (1884) I. L. R. 7 M. 341.
2. (1886) I. L. R. 10 M. 115.
3. (1892) I. L. R. 16 M. 294.
4. (1902) I. L. R. 26 M. 291.

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present case no such relief has been asked, although the remission claimed has been refused from the year 1878. We must therefore hold that Article 120 applies to this suit, which was brought to obtain a merely declaratory decree."

This, again, is a distinct expression of opinion: though it appears to involve the somewhat surprising result that a man asking merely for a decree declaring his periodically recurring right must sue within 6 years under Article 120, whereas, if he asked for relief consequential on the said right, he could claim 12 years under Article 131. The starting point for limitation would presumably be the same in each case.

The last case is *Ratnamasari* v. *Akilandammal* [1]. The scope of Article 131 was not in issue, but Bhashyam Aiyangar J. in the course of the judgment appears to hold that Article 131 is not confined to a declaratory suit, but may include one " for recovery of arrears due in respect of a periodically recurring right. " This remark is simply made in illustration of the learned Judge's argument on another point.

Two of these cases, *Ramnad Zemindar* v. *Dorasami* [2] *Ratnamasari* v. *Akilandammal* [1] were considered by the Allahabad High Court in *Lachmi Narain* v. *Turab-Un-Nissa* [3] and expressly dissented from, though apparently under some misapprehension of the true effect of the earlier case. The learned Judges preferred to hold that the language of Article 131 "to establish a periodically recurring right" could not be extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a periodically recurring right.

The Calcutta High Court appears to take the same view: vide *Kallar Roy* v. *Ganga Pershad Singh* [4] in which they held that a suit for recovery of arrears of malikhanas where plaintiff does not seek to enforce a charge is governed by Article 115. It is to be noted however that Article 131 is not specifically referred to in the judgment.

The Bombay High Court has held in *Sakharam Hari* v. *Laxmipriya Tirtha Swami* [5] that Article 131 does apply to a suit for arrears due under a periodically recurring right if brought against the person originally liable to pay.

1. (1902) I. L. R. 26 M. 291. 2. (1884) I. L. R. 7 M. 341.
3. (1911) I. L. R. 33 All 246. 4. (1905) I. L. R. 33 Cal. 998.
5. (1910) I. L. R. 34 Bom. 349.

Manavikrama Raja v. Achutha Menon.

In this conflict of rulings, and, inclining as we do to a view contrary to that taken in previous decisions of this Court, we feel constrained to refer the following question for the decision of a Full Bench.

" Does Article 131 of Schedule II of the Limitation Act apply to suits brought to recover sums due under a periodically recurring right (*a*) where there is a prayer for a declaration that the plaintiff is entitled to such a right and (*b*) where there is no such prayer ?"

Tyabji J:—I agree. Article 131 of the Limitation Act seems to me to have been meant to apply only where (in the words of the article) " the plaintiff has been refused the enjoyment of a periodically recurring right" and he wishes to establish that such a right exists. The language of the article does not seem to me to be appropriate to a suit for recovering sums that have become due under, or as a consequence of, such a right. Speaking with reference to the facts of this case it seems to me that the article applies to this suit in so far as it has reference to the establishment of the right to the adima allowance; but that the article does not refer to the claim for payment of the allowance already due under the right so established. The two questions are quite distinct and apart from the decisions cited by my learned brother I should be inclined to doubt whether both were intended to be included within words which as I have said seem to me to be appropriate to only one of them.

T. R. Krishnaswamy Aiyar for *T. R. Ramachandra Aiyar* for the Appellant.

J. L. Rosario for the Respondent.

T. R. Krishnaswami Iyer for Appellant. Article 131, will apply only to cases where the prayer is for a declaration of the right. It will not apply to a case of recovery of arrears. But in some of the cases, the article was held applicable only to suits where in addition to a prayer for declaration, there was a prayer for consequential relief also. The earliest case in Madras is *Ramnad Zamindar* v. *Dorasami* [1].

In *Ramnad Zamindar* v. *Dorasami* [1], there was no prayer as regards the arrears. Hence article 131 was applied. *Alubi* v. *Kunhibi*, [2], is against us. But in that case the question whether article 131 is applicable to arrears alone was not considered.

1. (1884) I. L. R. 7 M. 341. 2. (1886) I. L. R. 10 M. 115.

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Being a grant of revenue, article 132 was also held to be applicable. In *Balakrishna* v. *The Secretary of State for India*[1] it was held Art. 131 applies only to suits in which a decree for consequential relief is asked for by virtue of the periodically recurring right—and a suit for a mere declaration was governed by Art. 120.

The same view was expressed by Bashyam Aiyangar J. in *Ratnamasari* v. *Akilandammal*[2] where the meaning of "to establish" is discussed, and see also *Srinivasa Ramanuja Chariar* v. *Subba Chariar*[3]. *Jagannatha Pandiajiar* v. *Muthiah Pillai*[4] was a case to *establish* a person's right to recover rent. See also *Ramachandra* v. *Jagan Mohana*[5].

In *Sriman Madhabushi Achamma* v. *Gopusetti Narayanasami Naidu*[6] it was held that a suit for a declaration that the landlord had no right to collect excess was governed by article 120 and not by 131. See also *Secretary of State for India* v. *Janakiramayya*[7].

The decision in *Lachmi Narain* v. *Turab Unnissa*[8] is directly in our favour. There it was held that article 131 applies only to suits to *establish* the right and that suits for recovery of arrears was governed by Articles 115 or 116 as the case may be. *Dost Muhammad Khan* v. *Sohan Singh*[9] was followed and *Ramnad Zemindar* v. *Dorasami*[10] not followed. Article 131 applies only to a suit to establish the recurring right and it does not apply to a suit for recovery of specific sums of money as arrears. Art. 120 is applicable to such a case. *Kallar Roy* v. *Gunga Pershad Singh*[11] referred to

Sakharam Hari v. *Lakshmipriya Tirthaswami*[12] is apparently against us, but distinguishable in that their Lordships proceeded on a misconception that article 131 of 1877 corresponded to article 132 of Act IX of 1871. In *Harmukh Gauri* v. *Hari Sukh Prasad*[13] article 132 was held applicable. It is a Case of Hak.

In *Raoji* v. *Bala*[14] suit was brought to establish plaintiff's title to a certain share in an allowance and for recovery of arrears. Held that as regards declaration article 131 applies and that the claim for arrears would be governed by art. 120.

1. (1892) I. L. R. 16 M. 294.
2. (1902) I. L. R. 26 M. 291 at 313, 314.
3. (1902 13 M. L. J. 267.
4. (1904) 14 M. L. J. 477
5. (181) I. L. R. 15 M. 161.
6. (1909) I. L. R. 33 M. 171; S.C. 19 M. L. J. 784
7. (1913) 24 M. L. J. 365.
8. (1911) I. L. R. 34 A. 246.
9. (1884) I. L. R. 7 M. 341.
10. (1900) Punjab Recorder, 303.
11. (1905) I. L. R. 33 C. 998.
12. (1910) I. L. R. 34 B. 949.
13. (1883) I. L. R. 7 B. 191,
14. (1890) I. L. R. 15 B. 135,

As regards declaration alone art. 131 would apply, but for recovery of arrears arts. 62, 115, 116 or 120 as the case may be applied.

As regards the meaning of "*Establish the right*" See Sec. 283 of the C. P. C. of 1882, and 14 M. 23, 29 M. 151 and 35 C. 202 at 206. 16 American cyclopædia pages 591 and 592.

Mr. Rosario. Each year's rent or allowance is a distinct right, and the refusal of the enjoyment of the right for a particular year is the same as the refusal of the right for another year;

A suit for recovery alone would lie under this article and not a suit for a mere declaration. A suit for mere declaration could not lie as it contravenes the provisions of S. 42 of the Specific Relief Act. In every suit for recovery there is implied a prayer for declaration of the right. So article 131 was applicable to cases of recovery. Article 131 is held applicable only to cases other than mere declaration in *Ratnamasari* v. *Akilandammal* [1] and *Balakrishna* v. *The Secretary of State for India* [2]. *Dostmuhammad Khan* v. *Sohan Sing* [3] is distinguishable. This article is not applicable for a case of mere declartion. *Sakharam Hari* v. *Lakshmi Priya Thirthaswami* [4] is correctly decided and should be followed.

T. R. Krishnaswami Aiyar referred to *Chhagan Lal* v. *Bapubhai* [5] and *Sriramulu* v. *Jarraju.* [6] A suit for declaration of title to lands can be brought within 12 years; but profits could be recovered only for 3 years. S. 42 of the Specific Relief Act would not control article 131 of the Limitation Act, Act IX of 1871 contained this same provisions as article 131 of the act of 1877. The Specific Relief Act is a later enactment of 1877 and the similarity in the wording of article 131 in the act of 1871 and 1877 shows that S. 42 of the specific Relief Act was not intended to control the scope of Art 131.

Referred to Starling on Limitation on the scope of the article. The answer to the reference must be 'No' on both the points or that article 131 is applicable as regards declaration, but is not applicable as regards the recovery of arrears. At any rate the answer to (*b*) must be in the negative.

1. (1902) I. L. R. 26 M. 291 at 313, 314.
2. (1893) I. L. R. 16 M. 294.
3. (1906) Punjab Recorder 303.
4. (1910) I. L. R. 34 B. 319.
5. (1880) I. L. R. 5 B. 68.
6. (1913) 24 M. L. J. 133.

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The Chief Justice :—If this matter had been *res integra* I should have been disposed to hold that Article 131 should be construed as applying to a suit brought for the purpose of obtaining an adjudication as to the existence of an alleged periodically recurring right, and not to a suit in which it was sought to recover moneys alleged to be due by reason of the alleged right. The question of the existence of the right is no doubt distinct from the question of the right to recover moneys if it is established that the right exists. It is however, difficult to see why the period of limitation should not in both cases be the same, as it is in the case of a suit for a declaration of a right to maintenance and in a suit for arrears of maintenance. If the contention of the appellant is well founded there is no article which deals specifically with the period of limitation in the case of a suit to recover moneys due under an alleged periodically recurring right. There is force in the contention that the use of the word "establish" and the fact that there is only one article in the case of a suit with reference to a periodically recurring right, and not two as in the case of suits based on an alleged right to maintenance (see Articles 128 and 129) indicate that the legislature intended to deal with both classes of suits in Article 131. I am not prepared to dissent from the view indicated in the Madras cases referred to in the order of reference, a view which has also been adopted by the Bombay High Court. See *Sakharam Hari* v. *Laxmipriya Tirtha Swami*.[1] I would answer the question which has been referred to us in the affirmative,

Sankaran Nair J :—The question is not free from doubt. But I am not prepared to differ from the decisions of this Court and I would therefore answer the question in the affirmative.

Oldfield J :—I agree with the learned Chief Justice for the reasons stated by him.

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1. (1910) I. L. R. 34 B. 349.

Meenakshi Amma v. Secretary of State for India.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Aiyar.

Mukkassa Nair Veettil Meenakshi Amma ... *Appellant.* *† (*Plaintiff*).

v.

The Secretary of State for India in Council ... *Respondent.* (*Defendant*).

Water course—Beds of natural streams in Malabar—Non-tidal and non-navigable—Ownership of, vests in adjoining proprietors and not in Crown—Suit for declaration of easement right against Government—Non-joinder of adjoining proprietors—Objection not taken in time—25 years' construction of dam—Proof of easement—Finding of fact based on erroneous presumption of law—Effect of—Second Appeal—Custom in Palghat.

Per Sankaran Nair J.—In Malabar, the law as to ownership in beds of natural streams is the English law *viz* that beds of natural streams not being tidal and navigable vest in the adjoining proprietors and not in the Crown.

Alleged custom to the contrary in the Palghat Taluk referred to but no opinion expressed as to its validity.

In a suit for declaration against the Secretary of State that the plaintiff was entitled to construct a dam, the Crown having failed to prove that it was the owner of the bed and the construction of the dam for over 25 years being found

Held, per Sankaran Nair J.—That the plaintiff was entitled to a declaration of her right to construct the dam against the Crown and the objection that the adjoining proprietors were not parties not having been taken earlier, was no reason for not giving her the relief.

Per Sadasiva Aiyar J. :—Plaintiff not having made out her right of easement as against the adjoining proprietors and the said proprietors not being before the court, declaration prayed for could not be granted.

Government ownership in public footpaths and in beds of natural streams is not inconsistent with the general theory of private ownership of lands in Malabar.

His Lordship felt inclined to hold the view that prima facie they vest in the Crown, but did not express a final opinion.

A finding of fact though based partly on an erroneous presumption of law cannot be interfered with unless the finding is materially vitiated by the error.

Second Appeal against the decree of the District Court of of South Malabar in Revised Appeal Suit No. 537 of 1906, preferred against the decree of the Court of the District Munsif of Manjeri in Original Suit No. 472 of 1905.

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†This case came before this Court previously in S. A. No. 606 of 1907 when the Court (Benson and Sankaran Nair JJ.) delivered on the 20th Januray 1910 the following

Judgment :—We are unable to agree with the Judge that the pleadings involve an admission by the plaintiff that the thodu belongs to the Government. The

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* S. A. No. 39 of 1911. 3rd February, 1914

Meenakshi Amma v. Secretary of State for India.

This Second Appeal came on for hearing on Thursday, the twenty-eighth day of November 1912 and the Court made the following

ORDER.—The plaintiff's case is that she is entitled to erect a dam across the channel in dispute. The defendant disputed that claim on various grounds. The District Judge has dismissed the suit on the ground that there is a public footpath across the channel and the erection of the dam would flood the footpath with water.

The Munsiff found that the channel or thodu is private property and that the defendant has failed to prove that either the channel or the pathway across it is Government property. He held following *S. Sundaram Ayyar* v. *The Municipal Council of Madura and the Secretary of State for India in Council* [1] that it is only the surface of the pathway and so much of the subsoil as is necessary to maintain it as a road that belonged to the public or the Government. He further found that the plaintiff and her predecessors in title have been putting up dams for more than the prescriptive period, but that the dam which she put up last was a higher dam which interfered with the use of the path more than before and accordingly dismissed the suit.

There is no finding by the Judge on any of these questions. If the channel is private property and the pathway was dedicated by the owners to the public, then the question for consideration will be what were the conditions, if any, under which it was dedicated to the public ? Dedication to the public in this case is found by long user. That user will also indicate the conditions of dedication, if any. If the plaintiff has been putting up this dam for more than the prescriptive period, as the Munsif finds, and the path was only used by the public with the water thrown back on it by the erection of the dam, the plaintiff is entitled to contend that the footpath is dedicated subject to this restriction. She may not be entitled to erect a

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plaintiff prayed for a declaration of her right of easement against the Government, as the Government denied the right set up by her. As the judgment is based on the assumed admission by the plaintiff of the Government's right to the thodu, we set it aside and direct the Judge to restore the appeal to his file and dispose of it according to law.

The costs will abide the result.

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1. (1901) I. L. 25. M. 635.

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dam which will throw back a larger volume of water and render the path not available as before. To decide these questions it is necessary that we should have findings on all the issues. We accordingly direct the judge to return findings on all the issues. He may resettle the issues and receive such further evidence if he thinks it necessary to do so.

The findings should be submitted within two months from the date of this order and seven days will be allowed for filing objections.

In compliance with the above order the District Judge submitted the following.

FINDING.—

This is an appeal remanded to this Court for findings on all the issues in the suit.

2. The first issue is whether the plaintiff (appellant) has derived a prescriptive right to take water to her land by building a dam across the canal in question The Munsif, believing the witnesses of the plaintiff, finds that the prescriptive right of the Plaintiff has continued for more than the prescriptive period-taken by the Munsif to be twenty years-without any interruption and as a matter of right and is satisfactorily proved. The evidence of the plaintiff's witnesses, which shows beyond reasonable doubt that the practice of making a dam has continued for some 25 or 30 years, is not impugned by the defendant's (respondent's) pleader, but the inference of the Munsif that the thodu is the jenmam property of private owners and consequently belongs to the riparian owners is seriously contested and it is argued that the thodu is in reality Government jenmam property and that the Munsif has come to his conclusion on insufficient grounds. It is further contended that because the thodu is Government property the plaintiff must prove uninterrupted user for sixty years and that this she has failed to do.

It may be observed at the outset that there appears to be no evidence to prove that the thodu is private jenmam property, nor have the jenmis of the land adjacent to the thodu been joined as parties to the suit. The inference drawn by the Munsif is the result of his application of the rule of English law that the bed of non-tidal rivers belongs to the riparian proprietors "*usque ad medium filum fluminis*," and he remarks that this law has been made applicable to Malabar by the decision in *The Secretary of State for India* v. *Kadirikutty and others* 1 He also observes, "If a river belongs to private owners the claim of private owners to a thodu which is a stream smaller than a river must be stronger. The canal in dispute is only a thodu. Therefore the thodu must be found to be the jenmam of private owners". These observations appear to amount to the proposition that because thodus are smaller than rivers and because some rivers belong to private owners, the particular thodu in question is private property, and it seems unnecessary to point out the fallacy of such reasoning. Moreover the Munsif appears to have failed to observe that while it was ruled in the case quoted that the principles of English law, by which the rights of the crown and riparian owners to accretions

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1 (1889) I. L. R. 13 M. 369.

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caused by alluvian are determined, are applicable to British India in the absence of local usage or statutory enactment to the contrary, it was also observed that there is nothing in the system of property as recognized in Malabar to displace the rights of the crown as they are ordinarily understood;

—"On the contrary the evidence indicates a recognition of these rights in recent times; and the grant traditionally recorded to have been made by the Brahmins to Keralan are enumerated among other sovereign rights 'the regulation of the beds of streams and accretion from the seas.' Malabar Manual Vol. 1 p. 226." The proprietary right of the Government to natural streams and rivers is usually asserted and in the case of a similar stream in Palghat taluk has been judicially recognized by this Court in A. S. 245 of 1894 in confirming the decree of the District Munsif of Palghat in O. S. 338 of 1892, in which it was proved that for many years the Government has over and over again in an immense number of cases, publicly asserted the proprietary right to accretions in the beds of rivers and streams in the Palghat Taluk and collected Jenmabhogam from persons who cultivated such accretions, while in not a single instance did the riparian proprietors resist the action of the Government. Such right has also been recognized by the Subordinate Jude of Calicut in the case of the Ernad Taluk. I have been referred to no higher authority directly to the contrary, but reliance is placed on the observation at page 375 of the Madras High Court ruling quoted adove that there is no presumption in Malabar that waste lands are the property of Government. Even, however, if it be held that the beds of all streams are to be considered to fall within the category of waste land, it does not follow that the Government has no right to own or control the water of such streams. Moreover since the date of the ruling, *The Secretary of State for India* v. *Kadiri Kutti*, Act III of 1905 has come into force and it appears to me that in the case of natural streams the presumption under S. 2 is that such streams belong to the Government, which usually controls them, and that the jenmi who claims a proprietary right to the bed of such streams must show that it belongs to him. In the present case no claim has been made by any jenmi to the thodu, which is proved by the evidence of the Revenue Inspector (1st witness for the defendant, after taking its rise in the hills, to flow for 12 or 15 miles through several amsoms and to be known by the name of Government Sirkar thodu. It is also entered in the Settlement register as the jenmam property of Government—a fact which may not be sufficient to prove the title of Government but strengthens the presumption that it is Government property. For in a District like Malabar, where people are ever ready to assert their rights to property and especially land, there is little doubt that objection would have been raised to such an entry if the thodu had been regarded as private property. The fact that permission was obtained by the plaintiff and her predecessors-in-title to dam the thodu is also an indication in favour of the presumption that the thodu is Government property. For these reasons I think that the finding of the Munsif that the thodu belongs to the riparian owners cannot be accepted and that in view of the presumption that the stream is Government property, the burden of proof was on the plaintiff to establish the easement claimed by her. This she has clearly failed to do, having admittedly enjoyed it for a period less than sixty years and with the permission of Government. My finding on the first issue is therefore in the negative.

3. On the second and third issues—whether the defendant is liable for damages and how much the plaintiff is entitled to, I find that the plaintiff, not being entitled to the right to dam the stream, is not entitled to flood the pathway and that the defendant is not liable for damages.

4. The findings of the Munsif on the 4th, 5th, 6th and 7th, issues were not contested and I adopt his findings.

5 On the 8th issue it appears to me that the damage claimed is too remote. The plaintiff was not justified in having her land left waste on the pretext that she could get no water for her land when she might by complying with the not unreasonable order of the Special Assistant Collector have obtained water for her land. My finding on this issue is in the affirmative.

This appeal came on for final hearing on Friday the 16th day of January 1914 after the return of the finding of the Lower Appellate Court.

K. P. M. Menon for Appellant.

Government Pleader (*C. F. Napier*) for Respondent.

The Court delivered the following

Judgments :—*Sankaran Nair J* :—The Judge has now found that the plaintiff has been constructing the dam at the spot across the bed of the stream or thodu for the past 25 or 30 years, but he has also held that in view of the presumption that the stream is Government property it must be held that the plaintiff has failed to establish a right of easement as she is bound to prove uninterrupted user for 60 years. Objection is taken to this finding and it is argued that there is no presumption in Malabar that the river beds form Government property. It is contended that they form the property of the riparian owners, as under the English law, and therefore proof of user for 25 or 30 years is sufficient to create a right of easement in plaintiff's favour.

I shall first deal with the contention as to the ownership of the bed of the stream. In the case of river beds which are not tidal and navigable the law is clear. " Prima facie every proprietor of land on the banks of a river is entitled to that moiety of the soil of the river which adjoins to his land and the legal expression is that each is entitled to the soil *usque filum aquae* " *Wright* v. *Howard* [1].

In America also Story J. has held the same view, *Tyler* v. *Wilkinson* [2] " Prima facie every proprietor upon the bank of a river is entitled to the land covered with water in front of his bank to the middle thread of the stream or as it is commonly expressed *ad medium filum aquae*." The Privy Council in *Khagendra Narain Chowdry* v. *Matangani Debi* [3] recognized the

1. (1823) 57 E. R. 76. S. C. 1 Sim. and St. 190. 2. IV Mason. U. S. R. 397.
3. (1890) 17 I. A. 62.

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same right in a suit to which the Government was a party. In this Presidency the rule has been always enforced in numerous cases. A very strong case is that reported in the Sadr Court Reports for 1858 p. 188 where the claim of the proprietor to the accretion to his land was upheld though it was formed only as a continuation of an accretion to a Government village (*Sree Raja Ooppalapaty Jogee Jagannadharauze* v. *Sub-Collector Rajmundry*) 1. The Malabar Jenmis are undoubtedly proprietors of land under these decisions. Prima facie therefore the same rule applies.

But the District Judge refers to the judgment in Appeal Suit 245 of 1894 District Court, and in another, apparently Appeal Suit 500 of 1907 Sub-Court, in support of his view and gives certain other reasons in support of his conclusion. It becomes therefore necessary to examine them.

An earlier judgment of his own Court directly in point was not apparently brought to his notice. The District Judge, Mr. Wigram, the learned author of the Malabar Law, in Revised Appeal Suit No. 643 of 1876 on the file of the District Court of South Malabar considered this question. In deciding the appeal he first of all assumed that the lands reclaimed from the beds of rivers were the property of riparian proprietors but afterwards admitted a review to have the question fully argued. In his revised judgment he stated the point for decision in these terms: "Whether by the custom of Malabar having the force of law, lands newly formed in, or reclaimed from, the beds of rivers are the property of Government." I quote his judgment *in extenso*:—

"2. The English law on the subject is succinctly stated in Shelford's Real Property Statutes, 8th Edition, by Carson page 112. Where a river is not navigable the presumption is that the soil is the property of the owners on each side to the middle of the river and in the more recent cases it has been held that the soil of the *alvens* is not the common property of the respective owners on the opposite sides of a river but that the share of each belongs to him in severalty; and extends *usque ad medium filum aquae* and again that the right of ownership of a moiety of the bed of a river passes under a conveyance of lands on the banks of a river although the conveyance points to a boundary

1 (1858) Mad. Sudder Court Reports 188.

which would not include any part of the bed (*Bickett* v. *Morris*, [1] *Crossley and Sons Limited* v. *Lightowler* [2].)

"3. The principle seems to have been adopted by the Privy Council in a Bengal case reported at XIII Moore 467 although it did not form the ground of the decision. Their Lordships say: There is another principle recognised in the English law derived from the Civil Law that where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, then, from the supposed necessity of the case and the difficulty of having to determine year by year to whom an inch or a foot or a yard belongs, the accretion by alluvion belongs to the owner of the adjoining land.

"The same principle was adopted by the Madras Sudr. Court in the case of a Godavari Lunkah (S. U. Decisions of 1858 page 188) and still more recently by the High Court in Second Appeal No. 480 of 1870 (not reported).

"*If such is the rule of law to be applied when the riparian proprietors are Zamindars who derive their estate from the ruling power a fortiori ought it to be applied to Malabar where from time immemorial the lands have been held by private persons.*

"4. The documentary evidence adduced by the Collector to prove the custom which it must be taken is an exception to the general rule is as follows":—

After referring to the documentary evidence * he continued,

"And the Tahsildar of Ponnani, two wealthy jenmis and the Kariasthan of a third have been examined.

*"VI Judgment of the Civil Court of Tellicherry in A. S. No. 141 of 1861.
VII Judgment of do. in A. S. No. 464 of 1861.
VIII Plan of the locality now in dispute prepared under the Collector's orders after the suit commenced.
IX Three kaichits executed to the Government as jenmi in 1828.
X Two pattas granted by the Government in 1836 and 1839.
XI Book showing the grant of cowles in 1853—54 in which the share of the jenmi for lands in the beds of rivers is reserved to Government.
XII Five kaichits executed to the Government as jenmi for waste lands near the banks of rivers (1855).
XIII Eight kaichits of a similar nature (1859—60).
XIV Book containing a list of waste lands sold by Government (1858 to 1865).
XV Correspondence between the Collector of Malabar and the Board of Revenue regarding salt-water swamps (1856 to 1859)."

1. (1866) L. R. 1 H. L. S. 47. 2. (1866) L. R. 3 Eq. 279.

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"5. Upon the evidence adduced it is impossible to doubt that at all events since 1854 the Government have claimed a right to deal with all lands newly acquired by the action of the rivers or reclaimed from the river by human exertions as their absolute property and that that claim has never been disputed by riparian proprietors, some of whom have actually purchased such lands adjoining their estates from the Government.

"There may have been isolated cases in which the Government asserted the same claim prior to 1854; but I cannot say that the evidence adduced on the point is satisfactory.

"8. The question therefore resolves itself to this—Can a course of dealings for 23 years acquiesced in by those interested to dispute them establish a custom which the law will recognise?

"I confess that I expected to have evidence adduced of what took place when the *Zamorin* was a reigning sovereign and of what takes place to this day in Cochin and Travancore, the neighbouring states where lands are held on similar tenures. A custom must be based on immemorial usage and the cautious language of the Collector in the first letter of the correspondence (XV) shows that even as regards salt-water swamps on the banks of back-waters he was in 1856 doubtful as to the rights of Government.

"9. On the ground that 6th defendant has wholly failed to prove the existence of any custom in Malabar which is—(torn) to the general—(torn) of law and that the proceedings of former Collector are perfectly consistent with an ignorance on the part of the land-owners of their rights I shall confirm my former decree and order 6th defendant to pay the costs of plaintiff of the rehearing".

The same view was taken in A. S. No. 204 of 1881, District Court, South Malabar. This was a case from the Palghat Taluk.

The next case that may be referred to is the well-known Attapadi case—*Secretary of State* v. *Vira Rayan* [1]. That suit referred to a tract of land about 232 square miles in extent. A large block of land was not claimed by any of the defendants. There were lands, streams, hills and forests which formed the upper part of the watershed of the Bhavani river. The question for decision was whether the rule that was presumed to be applicable to waste lands in the Eastern districts that they

1. (1885) I. L. R. 9 Mad. 175.

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formed the property of the Government was also applicable to Malabar and it was held by the High Court that it did not. The decision proceeded on the grounds that Malabar was a land of private proprietors and the Government must prove their title and possession within the statutory period to recover possession. And there is no presumption of ownership in their favour of any property then in suit which included rivers and forests. The riparian proprietors were treated as owners of riverbeds lying within or adjoining their estates. It appears to me the question now in dispute is concluded by that decision.

The next case that I may refer to is *Secretary of State for India v. Kadiri Kutty* [1]. I shall refer to it in some detail as the matter in dispute was raised in another form in that case and finally settled. There the question was whether a strip of land which had been reclaimed from the bed of a river belonged to the Government or not. The District Munsif held that according to the English law the land belonged to the plaintiff in that suit as a riparian proprietor. He was of opinion that, according to the Malabar law as declared in the case above referred to, *i. e.*, the Attapadi case, the Government had no proprietary right over lands in Malabar and for that reason also it belonged to the plaintiff. He held further that according to the Hindu law also the right is acquired by the first person who makes a beneficial use of the soil and that the plaintiff having been in possession of the land, was entitled to it. He also decided that, though the Government had proved that since 1858 they had been invariably claiming lands formed by the recession of rivers throughout Malabar and that such claims had been acquiesced in, it was not sufficient to prove a valid custom.

In appeal the contention was "that, by custom, they (*i. e.*, accretions to a river bank) belong to Government", and the District Judge states that the Government had advanced their claim only during the previous 30 years and that it was not contended that such claim was advanced before that date. He held that it could not be treated as a valid custom and that "in parts of India where Government has a right to all waste lands the question might be deserving of consideration, but, in Malabar, where Government have admittedly no rights on waste land", the claim could not be supported.

1. (1889) I. L. R. 13 M. 369.

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The judgment in Second Appeal is reported in *Secretary of State for India* v. *Kadiri Kutti*, 1. The High Court held that in the absence of local usage or statutory enactment to the contrary, the English law must be applied to India. According to that law it was pointed out that "the Crown is regarded as owner of the land covered by the sea" and "what is true with regard to the sea is equally true with regard to tidal navigable rivers" and that the land which was gained from the sea by sudden derelicton or alluvion or from the tidal navigable rivers also belonged to the Crown. It was pointed out that "the rule referred to by the District Munsif according to which the riparian proprietors are entitled to the bed of the river, *ad medium filum*, is not applicable in the case of navigable rivers in which the tide flows and reflows." Then followed certain observations on tidality and navigability. Then theysaid "there seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India in the absence of local usage or statutory enactment to the contrary." And one of the principles referred to is the right of the riparian proprietor to half the bed of the stream as under English law. It was also pointed out that the Judicial Committee had already applied the principles of English law to Indian cases. The principle that waste lands are not the property of Government was declared to have no application to land covered by the water of the sea or by a tidal river. Throughout the judgment the learned judges assume that the right of the crown can only exist in the case of tidal navigable rivers and they accordingly remitted issues to try the questions whether the river there in question was a tidal navigable river and also other questions which it is unnecesary now to refer. If the beds of rivers not tidal or navigable belonged to Government there would have been no necesssity to remit the issues. The entire judgment leaves no room to doubt that the rules of English law as to river beds were applied in their entirety and the reason of the law too was stated. It was that the land covered by the water of the sea or a tidal river was not the land of the neighbouring jenmi when it remained covered with water. Unless we are prepared to hold that the rule of the English Law is to be applied only when it is in favour of the Government and not to be applied when it is against the Government it is difficut to hold that that

1. (1889) I. L. R. 13 M. 369 at p. 373.

decision does not conclude the matter now in dispute. It will be seen that the learned judges expressed no disapproval of the decision of the lower Courts which held that neither by the Common Law of Malabar, which was declared to be the same as the English Law, nor according to the custom set up by the Government they had any interest in the bed of the stream. But it was in accordance with the view that the English Law was applicable that they held that such law itself recognised a distinction in the case of tidal navigable rivers and that they sent down this issue. To my mind it is perfectly clear that the question before us is concluded by that decision. It is remarkable that the learned judges there did not refer to the earlier decision of Mr. Wigram which proceeded on the same view of the applicablity of the English Law and it is also noticeable that before the High Court there was no attempt to dispute the correctness of the proposition that the English Law in its entirety was applicable to Malabar. The authorities relied upon are English and Privy Council decisions which applied these principles to India. I think, therefore that, unless that decision is overruled by a Full Bench, the question cannot be decided in favour of the Government.

The next case that may be referred to is the judgment relied upon by the District Judge in A. S. No. 245 of 1894, District Court, South Malabar. The Munsif in disposing of the original suit found that the Government had proved a custom as to the ownership of river beds in the Taluq of Palghat. His judgment was confirmed in appeal. In disposing of the appeal, Mr. Justice Benson, then District Judge, stated the law in these words:—

"With regard to the *second issue*, it is admitted that the river in which the accretion occurred is not tidal or navigable, and that the right of Government to accretions depends on the proof of a *valid custom*, failing which the English Law would be applicable, and the accretions would belong to the riparian owners."

In considering the evidence he stated that he did not attach any importance to the action of the Government in respect of the dams and anicuts as it was quite possible that the Government might have a right to control and regulate the flow of the water without having a right to the bed of the stream. But he found that the evidence showed that for 33 years the Government had exercised these rights. That under the general law a

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riparian proprietor is the owner of half the bed of the stream in Malabar was not denied. The decision is only an authority on the question that a local custom against a general common law exists in the Taluq of Palghat.

It is unnecessary to consider whether that decision upholding a local custom in derogation of the general law will now be followed. The alleged custom was of recent origin. It was not shown to be uniform and there was a decision the other way. It is open to all the objections advanced by the Judicial Committee to a custom of impartibility confined to the Madras Presidency in the Pittapore case. The local custom presupposes that the general law applied to Palghat before its origin. The Government claimed and exercised their rights in river beds not in virtue of any local custom because Palghat land tenures are not alleged to differ from the rest of Malabar, but in accordance with what was erroneously asserted to be the general or customary law applicable to all Malabar. The instances therefore are not proof of any local custom.

The Judge next refers to the judgment in A. S. 500 of 1907 which came to the High Court in Second Appeal No. 377 of 1909. In that case the Subordinate Judge before whom the case came on appeal stated that the proposition which the Secretary of State put forward " is no doubt extraordinary, but he is entitled to get an opportunity to establish it if he can " and he accordingly remitted an issue to try the general question whether by the usage of Malabar the beds of even non-tidal and non-navigable rivers and streams are vested in the Crown. In submitting the finding the Munsif states that though the issue referred to all rivers and streams "the evidence was confined to such streams as flow through the lands of several jenmis and through several amshoms. Small streams are therefore now excluded from the claim by Government". The suit related to lands in the Ernad Taluq and he found that the Government had been collecting jenmabhogam for 19 years. He also referred to the vagueness of the evidence which did not show the distinguishing characteristics of the rivers claimed by the Government. The Subordinate Judge in appeal found that the Government had been exercising rights of ownership in regard to such natural streams as ran for many miles and irrigated the lands of several jenmis in several Amshoms. With reference to the ownership claimed he says that

the nature of the stream, whether it is a river or whether it is only a "thodu" as he calls, is a question of fact which must be decided upon the facts of each case and he accordingly upheld the Government claim. Here also it is to be noted that the claim of the Government as advanced was not a general claim to all river beds as now put forward but to what the Subordinate Judge calls rivers and large streams. In second appeal the decrees of the lower Courts were reversed on a preliminary ground so that the question of ownership was not decided by this Court.

There are no doubt observations in the judgment of the Subordinate Judge which support the Government claim and deny the right of riparian proprietors; they apply with equal force to similar claims of the *Zamindars* in India and of owners in England and in America. I am therefore not prepared to attach much weight to them.

The Judge refers to the numerous instances proved in the Palghat suit. But they were all recent and the custom was challenged within thirty or forty years. The jenmabhogam was treated as revenue and could not be disputed in the Civil Courts. Payment of jenmabhogam is submission to necessity and not evidence of consciousness of validity of the claim. Resistance would have resulted in the imposition of penal assessment or revenue sale of property. Similarly purchase by riparian proprietors from Government is proof of evasion as pointed out by Parker J. in *Secretary of State* v. *Ashtamurthi* [1] and purchase of peace rather than recognition of Government claim.

It may be useful to notice the law on the point as understood before 1852 and the probable origin of the practice which is now sought to be converted into a valid custom, if not, as proof of the ancient customary law itself.

In 1800 Dr. Buchanan who was specially directed by the Governor-General to report on the condition of the District reported that the "whole soil" belonged to the private proprietors, *i. e.*, Brahmin Nambudris, devasvoms and royal families,—see Volume II, page 60.

The views of Major Walker who wrote the first book on Malabar Land Tenures as to jenm right is well-known. In the

1. (1889) I. L. R. 13 M. 89.

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early years of the last century when the question whether the Zamindary settlement should be introduced into these districts was under discussion the officials were unanimous in reporting that "in Malabar with the exception of a few estates forfeited by rebellion there appear to be no Sircar or Government lands, individual proprietory right generally prevailing throughout the province," See paragraph 178 of the report of the Board of Revenue in 1809. (5th Report, Volume II, page 440),

In 1807, Mr. Thackeray who was deputed to enquire into the land tenures of Malabar also reported "Almost the whole of the land in Malabar, cultivated and uncultivated, is private property and held by jenmam right which conveys full absolute property in the soil."

In a despatch in December 1813 relating to the settlement of Malabar the Directors similarly observed that in Malabar they had no property to confer with the exception of some forfeited estates—See Revenue Selection volume I, page 511. This was the basis of the Attapadi judgment. The same reasoning applies also to river beds.

Colonel Munro's report in 1817 is very instructive. He states that Malabar was divided into villages which were called Desams, that the headman was called the Desway when he had the direction of the religious ceremonies of the village pagoda and the management of the pagoda lands and servants and that otherwise he was called jenmi. He further says that the Desways "were at one time the sole proprietors of the land of their respective villages... There was a Desway to every village, except where the village was the private property of the Chief of the district :.............when the rights of the head of the village belonged" to that chief. He gives the sources of income. (See paragraph 5). He had no proprietary interest whatever of the sort that is now set up on behalf of the Government.

The Collector, Mr. Conolly, in a memorandum drawn up for the Government in 1840 stated that "all land in Malabar is strictly private property." See his letter to Government, dated 8th October 1853, No. 34B, Judicial Department—enclosure to minutes of consultation under date 15th November 1853, Judicial Deparment. Till 1850 no attempt was made to claim ownership in river beds. In 1852 Mr. Strange was appointed Special

Commissioner to enquire into the Moplah outrages and there was a long correspondence relating to land tenures which made it difficult for moplas and poor persons to get lands for cultivation on fair terms. It therefore became the object of Government to restrict within such limits as the law would allow them the extensive claims which were put forward on behalf of the jenmi in order to assign lands to Moplahs and other persons to evade the jenmi tyranny and they began to show increased activity in allotting waste lands which belonged to jenmis to any person who applied to take them up by virtue of a supposed right of the Government, now declared to be non-existent. They also began to assert their claims to assign river beds and accretions from the rivers; and we find from that time till about 1877 such rights were asserted in various instances. In 1877 when the matter was brought before Mr. Wigram in South Malabar he disallowed the Government claim on the ground that it was opposed both to the English law and to the customary law of the country. On the same ground Mr. Cox disallowed it in North Malabar. I am not aware that, from that time, any judicial officer has recognised the general claim of the Government that is now recognised by the District Judge. To me it is clear that a practice, which sprung up only after 1850, disallowed in a judgment in 1877 in which all the available evidence was apparently given, and contested whenever set up in a Court of law afterwards, cannot now be held to be a valid custom. They can only be treated as unauthorized interferences with private property. The evidence of the so-called custom to grant jenmis' lands on cowle was stronger in *Secretary of State v. Kadiri Kutti* [1] and derived some support from the ancient Malabar law as to waste lands. Yet it was not upheld. Here the principles of the Malabar Land Tenures negative the claim advanced on behalf of Government. The theory is that the land was the property of the Nambudris and the Devasoms. The fact that before the Mysore invasion no land tax was paid is due to this fact. The Royal families and the local chieftains also acquired jenm, and later all classes, but they claimed the same completeness of ownership as the Brahmins. Jenm deeds may be found in the old books and reports and in Logan's Malabar Manual volume II. They purport to sell the entire land in within defined boundaries including stones good or bad

1. (1889) I. L. R. 13 M 369.

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stumps of nux vomica, thorn, roots, pits, mounds, treasure, lower earth, water, ores, canals, streams, forests. They prove an ownership as complete as possible, In England the theory is that the land is held directly or indirectly under the Crown. In India, the *Zamindars* hold them under Government sanads. Yet they have got the rights that are held to appertain to riparian proprietorship: stronger reasons exist for recognising them in favour of jenmis. Many streams and channels are dry for months and are capable of actual occupation or cultivation—their beds are often cultivated. I have no hesitation in disallowing this contention and in holding that the channel is private property, If the river bed is private property then Act III of 1905 has admittedly no application.

It is stated that no claim has been advanced by any jenmi to his thodu. But it is not shown that any claim was on any occasion advanced by Government to the knowledge of Kiyake Kovilagam the only riparian proprietor whose name appears in the records. That the tenant obtained permission to put up dams is no evidence against the jenmi. Moreover such permission was necessary to flood the path. It may be as Mr. Benson pointed out in the Palghat case this erection of a dam is not any evidence in support of Government. I offer no opinion on this point. I hold therefore that the thodu or watercourse in question is private property.

The plaintiff has proved user for 25 or 30 years. She has acquired the right to construct the dam. The Government pleader contends that she cannot acquire any easement against her own Jenmi. But it is admitted that there is no evidence that her Jenmi is the riparian proprietor where the dam is constructed. It is probable he is the jenmi on one side of the channel. But there is no evidence of it and if he is the jenmi the plaintiff would be entitled to do it with his consent and as there is no evidence who the riparin proprietors are on either side of the dam, I would declare her right to construct a dam.

But if she wishes to construct a dam of the kind she has been putting up in recent years, she must show that she is entitled to flood the path. The channel being private property it is true the surface of the path alone can be presumed to have been dedicated to the public. But the plaintiff cannot claim to have acquired the right claimed by prescription against the

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Crown representing the public as she has not proved 60 years' user as of right of the right claimed. Even the user proved by her was with the consent of the Revenue Officials and therefore not evidence in support of the claim of easement against Government. She has not shown that the path was dedicated subject to her claim, as it is not proved that the dedication of the path was subsequent to the date of the first erection of the dam.

The plaintiff can therefore only erect a dam which would not interfere with the use of the path.

This was the only condition sought to be imposed by the Revenue officials though subsequently higher claims were advanced.

I might add that the Government Pleader's contention that these questions do not arise on the allegations in the plaint and in the absence of the jenmis, comes too late. It is concluded by the two previous orders of this Court. The Government did not apply to make the jenmis parties, or if the objection had been raised earlier, either the plaintiff might have made them parties or the Court might have directed it to be done.

I would therefore modify the decrees of the Courts below by declaring the plaintiff's claim as above indicated and confirm the decrees in other respects—the parties to bear their own costs throughout.

But as my learned brother disagrees with me the second appeal is dismissed with costs.

Sadasiva Aiyar, J:—I have had the great advantage of a study of the judgment written by my learned brother in this case, I regret, however, that my conclusion is somewhat different from his.

As I read the plaint, this is a suit for two reliefs (1) for the declaration of "the plaintiff's easement rights to put up a dam in the Kottamal Todu and taking water from it in accordance with the ancient usage for the use of the cultivation of the plaint lands;" (2) for past and future damages consequent on the Collector's alleged wrongful acts,......directions and threats. Now an easement is "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to

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prevent something being done in or upon, or in respect of certain other land not his own." (See the definition in section 4 of the Easements Act). At the first blush, the plaint seemed to admit (that is, a perusal of the plaint leaves the impression in the mind that it impliedly admitted) that the bed of the thodu over which the plaintiff wanted to establish her right to build a dam on belonged to the only defendant in the case, namely, the Secretary of State, and that the plaintiff wanted a declaration of her easement right to put up a dam on that bed belonging to the defendant. But the plaintiff seems to have contended before a Division Bench of this Court in S. A. No. 606 of 1907 that she did not mean to make any such admission that the bed of the thodu or the thodu belonged to the Government. This contention was accepted by the learned Judges who heard the said S. A. No. 606 of 1907: and the case was remanded to the Lower Appellate Court for fresh disposal.

Now it seems to me that if the plaintiff wanted to have a declaration of her easement right over the land of a third person and if that third person was not the defendant in the suit, she ought to inform the court who the third person was (other than the defendant) who was the owner of the land over which the plaintiff claims the easement right. Even after a second remand, the plaintiff would not clearly state to whom the bed of the stream belonged over which she wants to erect the dam. The contention before the District Judge seems to have been that the todu is private jenm property and that the bed of the stream belongs to the jenmis who own lands on either side of the todu. Assuming that half the breadth of the beds measured from one bank at the point where the dam is sought to be put up belongs to the jenmi who owns the lands on that bank and the other half breadth to the jenmi who owns the lands on the other bank, who are these two jenmis? One of the jenmis seems to be the plaintiff's own landlord against whom, she cannot claim any right of easement. The other jenmi's name is not disclosed. As against that undisclosed jenmi the plaintiff can establish an easement right only if she proves by suitable evidence that either by grant or by prescription (that is, by peaceable and open enjoyment as an easement and as of right without interruption for 20 years) she has acquired the easement right claimed by her. It seems to me clear that that undisclosed jenmi is a necessary party

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to a suit for a declaration of such an easement right, so that he might have an opportunity of showing that he made no such grants as is claimed by the plaintiff (if a grant is claimed by the plaintiff) or that the plaintiff did not erect the dam as of right but by license or that there has been interruption or even that she never erected any such dam except in recent years. In short, there is no evidence in this case which can be treated as legally establishing an easement right over the bed of the stream at the site of the dam as against the owners of that bed, assuming that the bed of the stream belongs to the jenmis (private owners), and not to the Government. On this short ground, I would dismiss the suit especially as the grant of a declaratory relief is a matter of discretion.

Even taking the view that the plaintiff has a right of easement to construct a dam over that portion of the bed of the stream over which she has been constructing a dam hitherto, but that she is not entitled to flood the path higher up (which, if I understand my learned brother aright, is the view taken by him), it is clear as my learned brother points out that the plaintiff's right of easement is not as extensive as the claims in the plaint but only a more restricted right, that is, the right is subject to the onerous condition that she should not interfere with the use of the path by the public. Even in this view, it seems to me that her suit for a declaration of the comprehensive right claimed by her ought to be dismissed as the Court is entitled to exercise a discretion in these matters and it is not bound to give a declaration of the qualified right even holding that that qualified right is proved by the plaintiff. On the above views, it is unnecessary to go into the difficult question of law discussed by my learned brother as to the right of the Government to the beds of streams in Malabar and to the sites of public path-ways in Malabar. I might, however, be permitted to say that I am not satisfied that the beds of natural streams and the sites of public paths even in Malabar do not belong to the Government as a rule. As regards waste lands strictly so called, (that is, uncultivated waste, capable of cultivation or of afforestation or mineral working etc.), we may take it that the *Secretary of State* v. *Vira Rayan* [1] has settled that "there is no presumption in favour of Government's rights so far as the Malabar Districts are concerned." But, as Lord Halsbury said, the decision in a particular case is an authority only for the points actually decided

1. (1885) I. L. R. 9 M. p. 175.

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in that case, that is, those points necessary for the decision of the case and I am not satisfied that *Secretary of State* v. *Vira Rayan* [1] decided that there is no presumption that the beds of natural streams or sites of public paths do not belong to Government I am inclined to the view that the Government as representing the public should be presumed to be the owners of the beds of natural streams and of the sites of public paths in Malabar as well as in other Districts and I believe that that is the common law of India whatever may be the common law in England or whatever may have been the Roman law on this point. Malabar might have been "a land of private proprietors" but the paramount rights of the State over the beds of natural streams (which do not both have their origin and also flow till the end of their course continuously through the land of the same private owner) and the paramount rights of the State over the sites of public roads and paths are not inconsistent with Malabar being a land of private proprietors, that is, of being a land in which all cultivated lands, cultivable waste lands, house-sites, residential sites, lands from which profits can be obtained in the shape of forests or mineral products and similar lands belonged to private proprietors at one time and presumably and *prima facie* do not belong to Government now. That the Government have been trying to contest the claims of jenmis over waste lands from several years even before Act III of 1905 was passed cannot be disputed. So far as public roads, streets, lanes and paths and the beds of rivers, streams, nalas, lakes and tanks, canals and water courses are concerned, the presumption should be, after the date of Act III of 1905, that they are Government property and not private property—(see Section 2 of the Madras Act III of 1905). If any private owner wishes to establish that the bed of a natural stream or the site of a public road belongs to him, it seems to me that the burden of proof is clearly cast upon him to establish the same, (see *Kundukuri Mahalakshmamma Garu* v. *Secretary of State for India* [2]) after Act III of 1905 was enacted. In this case, no such proof has been given. As regards the case in *Secretary of State for India* v. *Kadiri Kutty* [3] the only thing decided there was that even in Malabar the bed of a tidal navigable river *does* belong to the Government. It may be said that there are implied assumptions made in some of

1. (1886) I.L.R. 9 Mad. 175. 2. (1910) I.L.R. 34 Mad. 295. S.C. 20 M.L.J. 828.
3. (1889) I. L. R. 13. M. 369.

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the sentences in that Judgment that if a river is not a tidal navigable river, the bed belongs to adjacent owners as in English Common Law, and that the breadth of the stream belongs half and half to the adjacent owners. But this implied *obiter dictum* cannot, in my opinion, be treated as even an authority binding on us, much less a conclusive authority, especially after the passing of the Madras Act III of 1905. However, as I said, the question is not free from difficulty and I do not wish to express my final view on that question especially in view of the decided opinion to the contrary expressed by my learned brother. In this particular case, as I said before, it is unnecessary to finally consider that question. Lastly I am unable to get over the finding of fact in this case by the District Judge that the bed of the stream belongs to the Government. He bases his finding on six facts: (*a*) that no claim has been made by any jenmi to the todu; (*b*) that the defence 1st witness proves that the stream in question takes its rise in the hills, flows for 12 or 15 miles through several amsoms and is known as "the Government Sircar todu;" (*c*) that it is entered in the Settlement Register as the jenmam property of Government; (*d*) that permission was obtained by the plaintiff from the defendant (that is, the revenue officers) to dam the todu; (*e*) that there is the presumption under section 2 of Act III of 1905 that the bed of the stream is sircar land; (*f*) that there is also a decision in A. S. No. 245 of 1894 of the District Court of Calicut establishing Government's rights. Even taking it that the last two reasons given by the District Judge for his finding are unsound, there are the other four facts and circumstances mentioned by the District Judge to support his finding and though each on of the facts taken separately may not be sufficient to support the finding it cannot be said that a Court is not justified in treating the title of Government to the todu to be proved by those facts taken together. Because the District Judge relied also upon a doubtful presumption of law to arrive at his finding, it cannot be said that his finding of fact is so materially vitiated that it should be set aside in second appeal. As Mr. Justice Tyabji remarked in a recent case (S. A. No. 1429 of 1911) "Courts are not expected merely, so to say, weigh in balances of gold the evidence on one side or the other and if the scales go down by a hair's breadth on one side or the other, they are not expected to proceed on the basis that that fact is proved for all purposes." As the District Judge did not merely

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act upon a presumption in favour of the rights of Government but relied also upon other circumstances to find in favour of Government, I think that we are not entitled to interfere with his finding of fact (that the todu belongs to Government) in Second Appeal. In the result, I would dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ordinary Original Jurisdiction.

Present:—Mr. Justice Wallis and Mr. Justice Bakewell.

T. M. Narasimhachariar — *Plaintiff* *

v.

V. Krishnamachariar — *Defendant.*

Narasimhachariar v. Krishnamachariar.

C. P. C. (Act V of 1908) S. 63—Attachment by different Courts—Amount realised by the Court of the highest grade—All entitled to share rateably, though no transfer.

Where property is attached by different Courts and money is realised in accordance with S. 63 C. P. C. by the Court of the highest grade the attaching creditors are entitled to share rateably irrespective of the fact that their decrees have not been transferred to that Court.

V. V. Srinivasa Iyengar for Plaintiff.

C. K. Mahadeva Iyer for Defendant.

The Court delivered the following

Judgment:—*Wallis J.*—This case raises a question of some difficulty and importance as to the effect of S. 63, Civil Procedure Code, which provides that when property not in the custody of any Court is under attachment in execution of decrees of more courts than one, the court to receive or realize the property and to determine the claims thereto and objections to the attachment thereof shall be the court of highest grade, or where there is no difference in grade, the court which first attached. The section whilst conferring on the court in question exclusive jurisdiction not only to receive the attached property but also to determine claims thereto and objections to the attachment thereof even if such objection be to an attachment in one of the other courts does not say to what extent if any the court which receives or realizes the assets is to take account of the attachments in execution of

* O. S. No. 174 of 1913. 5th March 1914.

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the decrees in the other courts and different views have been taken as to this question. In the present case a debt due to the judgment-debtor by the Public Works Department and attached in execution of several decrees against the judgment-debtor in several courts has been paid into this court under S. 63 and O. XXI, R. 36 Civil Procedure Code by the Executive Engineer who has at the same time forwarded a list of the attachments served on him up to that time, one of which was prior in date to the attachment by this court. The case then came before me sitting alone, when the prior attaching creditor who has not transferred his decree to this court, claimed to be paid in priority to the decree-holder in this court, or at least to be entitled to rateable distribution; and in view of the importance of the question and the conflict of decisions, I directed the case to be posted before a Bench and notice to be served upon all the creditors mentioned by the Executive Engineer as having attached before payment into this court; and they have now appeared and preferred their claim to rateable distribution.

The right to rateable distribution is conferred by S. 73 upon holders of decrees for money who have made application to the court holding the assets for the execution of their decrees before the receipt of such assets. This right was conferred as to the assets realized by sale or otherwise in execution of a decree by S. 295 of the Code of 1877, whereas under Code of 1859 the first decree-holder who attached in execution of his decre was entitled to be paid in full as under the writ of *fieri facias* at common law and the principle of rateable distribution was only made applicable as against subsequent attachments. It appears to me that under this section both under the old Code and the present Code a substantive right as decided in *Sankaralinga Reddy* v. *Kandasami Tevan* [1] apply for a rateable distribution of the assets is conferred upon decree-holders who fulfil the prescribed conditions, though under subsection (2) such assets may be recovered back in a suit if it be shewn that the decree-holder was not entitled to receive them as where his debt was only colorable or the assets were subject to a prior charge *Shankar Sarup* v. *Mejo Mal* [2]. In this view every holder of a money decree who attaches property of the judgment-debtor in execution thereby acquires a right to share equally with other creditors in the

1. (1907) I. L. R. 30 M. 413. 2. (1901) I. L. R. 23 A. 313.

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assets arising therefrom when subsequently realized or received by the Court. The nature of the right which cannot be called a vested right is discussed in *Sankaralinga Reddy* v. *Kandaswami Thevan* 1. What however where the attachments are in different courts and the property is received or realized by the Court of the higest grade under S. 63. In such a case there is no receipt at all by the other courts unless the receipt by the Court of the highest grade can be deemed to be a receipt by the other creditors as well. In my opinion this is the correct view and it is only for purposes of convenience that the highest Court is made the collecting Court and the Court to adjudicate on claims and objections, and the property received or realized must be deemed to have been received or realized by or on behalf of all the Courts in which there have been attachments in execution of money decrees prior to the actual receipt of the assets. If this be so, then the decree-holders in the other Courts are entitled to rateable distribution under the very terms of S. 73. There seems no reason to suppose that it was the intention of the legislature to prefer the decree-holder whose decree happened to be in the court of the highest grade over other decree-holders who may have attached earlier and for large amounts. The difficulty is obviated if the payment into the Court of the highest grade is treated as payment into Court in all the suits and this in my opinion is the true construction of S. 63 which does not in terms confer any preference on the decree-holders in the highest court and indeed says nothing as to how after claims and objections to attachments have been dealt with the money realized is to be disposed of. This is quite natural if such disposal is governed by S. 73. On the other hand if that section does not apply and the decree of the Court of the highest grade is to be first satisfied, there is no provision as to how any balance is to be dealt with. According to the ordinary rule of construction a section like S. 63 which merely deals with procedure should not be construed as affecting the substantive rights *inter se* of the decree-holders in the different courts. The construction of S. 63 above adopted seems to be supported by the authority of *Wilson J.* in the unreported case referred to by Sale J in *Clark* v. *Alexander* 2 where property attached in execution of a decree of the High Court was subse-

1. (1907) I. L. R. 30 M. 413. 2. (1868) I. L. R. 21 C. 200.

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quently acquired under the Land Acquisition Act and the compensation money representing the property, whilst in the hands of the Collector was attached in execution of the decree by the Alipore Court, and was paid by the Collector into the High Court at its request. Though of opinion that in the circumstances of that case the money had been paid into the High Court irregularly and not strictly in accordance with S. 285 now S. 63, the learned Judge was of opinion there it must be deemed to have been "realized in all the suits" and rateably distributed. The same conclusion would have followed *a fortiori* if the money had been paid into the High Court regularly under S. 285 now S. 63. In this view all the holders of money-decrees who have attached in execution in any court before the actual receipt of the assets by the Court of the highest grade are entitled to share in the rateable distribution on application to such Court and without getting their decrees transferred to it. This has also been held by *Sale J.* in *Clark* v. *Alexander* [1] and of *O'Kinealy, J.* and another learned Judge in *Har Bhugat* v. *Anandaram* [2].

These two decisions have been doubted in *Ramjas Agarwala* v. *Guru Charan Sen* [3]. Where however the point did not arise for decision, and it has been suggested that decree-holders whose attachments were subsequent in date to that of the decree-holder attaching in the Court of the highest grade were not entitled to claim rateable distribution against him but that a decree-holder who had attached in another court before the date of his attachment might object to it and the Court might dispose of his objection under the express terms of S. 63 and prefer the creditor whose attachment was prior in date. For the reasons already given I am unable with great respect to adopt this view of the sections.

There is no doubt a decision of this Court in *Muttalagiri Nayak* v. *Muttayyar* [4] that the decree-holder in the Court of the lowest grade must get his decree transferred to the court of the highest grade before he can claim rateable distribution though S. 285 now S. 63 was mentioned in the argument, it is not referred to in the judgment or in the three cases cited in the judgment.

1. (1898) I. L. R. 21 C. 200
2. (1897) 2 C. W. N. 126
3. (1909) 14 C. W. N. 395.
4. (1883) I. L. R. 6 M 357

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Muttalagiri Nayak v. *Muttayyar* [1] has been dissented from on this point by *Krishnasami Aiyar, J.* in *Arimuthu Chetty* v. *Vyapuri Pandaram* [2] following *Clark* v. *Alexander* [3] and *Har Bhagat* v. *Anandaram* [4] but earlier in the judgment the learned Judge is reported to have laid down that he was bound to hold on the authority of *Muttalagiri Nayak* v. *Muttayyar* [1] that an application to the Court of the highest grade for execution before the receipt of the assets was an essential pre-requisite of a general claim to rateable distribution. No such proposition was to be found in the judgment, nor is there anything in the sections themselves as I construe them to support it. For these reasons I think all the decree-holders who attached the money in question in execution of their money-decrees before it was paid into this Court by the Executive Engineer are entitled to rateable distribution. The rateable distribution will be effected by this Court and the monies attached to creditors who have attached through the Courts other than High Court will be transferred by the Registrar to that Court.

Bakewell, J.—I agree.

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1. (1883) I. L. R. 6 M. 357. 2. (1919) I.L.R. 35 M. 588 S. C. 21 M.L.J. 505.
3. (1893) I. L. R. 21 C. 200. 4. (1897) C. W. N. 126.

PRIVY COUNCIL.

Present :—Lords Shaw and Moulton, Sir John Edge and Mr. Ameer Ali.

(On appeal from the High Court of Judicature at Madras.)

Sri Raja Venkata Narasimha Appa Row Bahadur Zamindar (now represented by Meka Venkataramayya Appa Row Bahadur and another — *Appellants.*

v.

Sri Raja Parthasarathy Appa Row Savai Aswa Row Bahadur Zemindar and another — *Respondents.*

Sri Raja Venkatadri Appa Row Bahadur Zemindar — *Appellant.*

v.

Sri Raja Venkata Narasimha Appa Row Bahadur, Zemindar, since deceased and another — *Respondents.*

Sri Raja Venkatadari Appa Row Bahadur Zemindar — *Appellant.*

v.

Sri Raja Parthasarathy Appa Row Savai Aswa Row Bahadur Zemindar and another — *Respondents.*

Raja Venkata Narasimha Appa Row *v.* Raja Parthasarathi Appa Row.

Hindu Law—Will—Construction—Joint power to adopt given to two widows—Validity of—Survival after death of one—Contemporaneous written document referred to in the Will—Admissible to construe Will—Duty of the Court to ascertain true intention—English rules of construction—Applicability to Hindu Wills—Giving liberal interpretation to Native Wills—Meaning of—Costs.

Where a Hindu made a Will providing *inter alia* that his two widows "should divide in equal shares my zamindari * * * * *......both should maintain our samasthanam clerks, dhasis and servants * * * * *......should adopt a boy who is our *sannihita* (one closely related) whenever it strikes you that our samasthanam should continue"

Held: that the dominating motive of the Will was secular and in the absence of a direction that an adoption should take place in all events the Court was not justified in interpreting the provisions of the Will in any special manner ;

That according to the plain meaning of the words the power given to the widows to adopt was a joint power resting in the discretion of both and as such, was not exercisable after the death of one of them.

Death of one of the donees puts an end to a joint-power. This is not by virtue of any peculiar doctrine of English Law, but flows from the nature of joint powers.

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If a power is given to A and B *personæ designatæ* to do an act if and when they think it desirable, the occasion cannot arise and the power cannot be exercised unless both are living and in agreement as to the act. The case is different when the power is vested not in *personæ designatæ* but in the occupants for the time being of a specified office.

Semble: Power given to more than one wife to adopt need not necessarily be invalid, though one only can receive the child in adoption so as to step into the position of adopted mother.

Held also that as the will referred only to the period of time when both widows were living and was silent as to the period after the death of one of them, to hold that the survivor could adopt a son, would be to provide for a period of time which the testator left unprovided for and unnoticed in the Will, in other words, would amount to making an addition to his testamentary dispositions, a thing that no court is entitled to do

In judging of the light in which the directions of the testator are to be regarded, it is legitimate to look at a contemporaneous document referred to in the Will which he wrote and caused to be written with the express intention to render clear his wishes with regard to his succession.

In all cases, the primary duty of the Court is to ascertain from the language of the testator what were his intentions *i.e.* to construe the will. In so doing the Court is bound to consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things which are summed up in the phrase "the Court is entitled to put itself into the testator's armchair". Among such surrounding circumstances none would be more important than race and religious opinions and the Court is bound to regard as presumably and (in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to right construction and once the construction is settled the duty of the court is to carry out the intentions as expressed and none other and in no case is the court justified in adding to his testamentary disposition.

The fundamental principle above referred to does not clash either with the principle that the court will not necessarily apply the English rules of construction or the other principle *viz.* of giving a liberal interpretation to Native Wills.

The English rules of construction amount in many cases to nothing more than saying that a special phrase which may be used in more than one sense shall *prima facie* be deemed to be intended to bear one particular meaning, unless from the consideration of the context or surrounding circumstances, the court can come to the conclusion that it is used in a different sense. In other cases the rules are the expression of such tendencies in the Court as the desire to avoid an intestacy or the presumption in favour of the immediate vesting of an estate. Such rules are purely an English product based on English necessities and English habits of thought and there would be no justification in taking them as guides in construing Indian Wills.

What is meant by "giving liberal interpretation to Native Wills" is that, that native testators should be ignorant of the legal phrases proper to express their intentions or of the legal steps necessary to carry them into effect, is one of the most important of the surrounding circumstances which the Court must bear in mind and the Court is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions.

Costs having been incurred on what were really the merits of the case, the consideration of which was rendered unnecessary by the determination of the points of law and having regard to the value of the estate and the difficulties of the inquiry their Lordships made no order as to costs.

Raja Venkata Narasimha Appa Row v. Raja Parthasarathi Appa Row.

Consolidated appeals and Cross Appeals against a judgment and decrees of the High Court dated November 20, 1905, affirming the decree of the Subordinate Judge of Kistna, dated December 2, 1899 and modifying the decree of the Court of the District Judge of Godavari dated December 12, 1903.

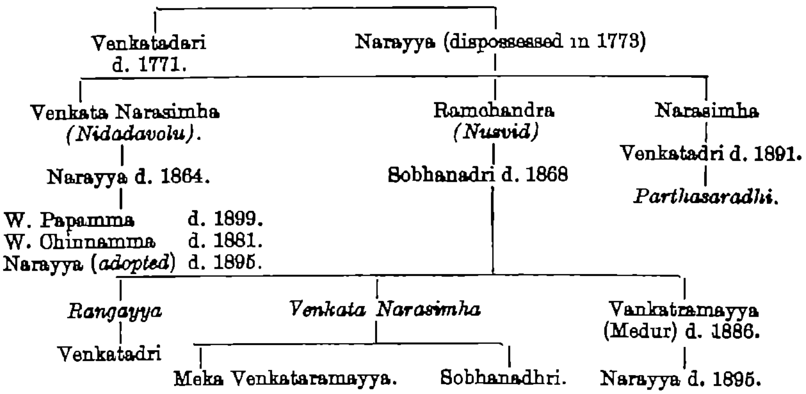
For a full report of the Judgment of the High Court see 16 M. L. J. 178 =I. L. R. 29 M. 437.

The main contention of the appellant Narasimha was (1) that he and his brother Rangayya were entitled to share Medur equally and that Parthasaradhi had no right thereto. This claim depended on questions as to the validity and effect of adoption of the last full owner of that estate named Narayya. Rangayya on the other hand claimed (2) that he was entitled to the estate to the exclusion of his brother as well as his cousin on the ground that Nidadavole was impartible by custom and that Medur had been incorporated therein and that both had devolved on him under the law of primogeniture.

The case was argued on the 2nd point in June, 1913 and the judgment of their Lordships was delivered on July 24th 1913 (reported in 25 M. L. J. 386) holding that as there were concurrent findings of the two lower courts against the existence of the alleged custom of primogeniture, their lordships in view of the series of decisions of the Judicial Committee from 1886 down to the present time against interfering with the concurrent findings of facts by the lower courts, did not wish to go on with the case on the point of custom and confirmed the finding of the lower Courts against the existence of the custom of primogeniture. Counsel were then directed to argue the first point, that of the validity of adoption by the elder widow. Application was then made to have the case postponed on the ground that counsel and pleaders who had come from India to explain the case had already left and before they could return the long vacation would have already commenced. It was granted and the case came on for hearing on Nov. 4, 1913.

The facts of the case have already been reported in connection with the judgment previously delivered, but having regard to the importance of the case the material facts to elucidate the points decided in the judgment are briefly set forth here.

The pedigree table of the parties is as follows :—



In 1784 the Government constituted the eldest son of Narayya, who had rebelled, the *Zamindar* of Nuzvid. In 1802 at the Permanent Settlement sanads were issued under Reg. XXV of 1802 granting part of the old *Zamindari* to the elder brother Venkata Narasimha as the *Zamindari* of Nidadavole and almost all the rest to the younger brother Ramachandra as the *Zamindari* of the six perganahs of Nuzvid. The new *Zamindari* of Nuzvid thus constituted at the Permanent Settlement was the subject of a partition suit in 1871 between the grandsons of Ramachandra the youngest of whom Venkatramayya obtained a sixth share and the lands allotted to him for his share were the *Zamindari* of Medur which was the second of the estates in question in these appeals.

Raja Narayya Appa Row of Nidadavole died in 1864 making the will in the suit giving Papamma and Chinnamma his two widows power to adopt. On the death of Chinnamma Papamma adopted Venkataramayya of Medur in 1885. This adoption being declared invalid, she adopted Narayya, the son of Venkataramayya. The said Narayya died intestate on Aug. 4, 1895. His natural mother Venkayyamma brought a suit in Oct. 1895 in the court of the Subordinate Judge of Ellore claiming the estate of Medur and other property left by her young son as his heir under the Hindu Law on the ground of the invalidity of the adoption of her son by Papamma. On the death of Venkayyamma the present appellants were brought on to the record as her representatives and the nearest reversionary heirs entitled on her death. In 1899 Papamma died. Parathasarathi instituted a suit in the District Court of Godavari against the appellants who were the natural

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uncles of the deceased Narayya. The claim was for one-third share of both the Zamindari of Nidadavole and Medur on the ground that the plaintiff as well as the defendants were the nearest reversionary heirs of Papamma's husband living at her death and also of her alleged adopted son. Rangayya on the other hand asserted that the Nidadavole estate was impartible and that the Medur estate had been incorporated with Nidadavole and was also impartible for that reason and consequently passed on to him alone under the rule of primogeniture. The other defendants denied the validity of the adoption of Narayya and contended that if the adoption was valid Narayya ceased to have any right in the Medur estate and that on the death of Venkayyamma they became entitled to the same in equal shares or Rangayya alone became entitled to it if it were impartible. The Subordinate Judge *held* the will to be genuine and that Papamma was competent to adopt the boy after the death of his co-widow. The District Judge on the other hand, held the Will to be a forgery and regarded the authority to two widows to adopt a boy as invalid according to Hindu Law as settled by *Annapurni Nachiar* v. *Forbes* [1]. On appeal to the High Court it was held that the Nidadavole estate was not impartible and never partook of the nature of a Raj. The will was declared to be genuine and the power to two widows to adopt jointly was held valid under Hindu Law and the exercise of such power on the death of one of the widows equally so. It was also held that as Narayya had no co-parcener his interest in the Medur estate was not divested on his adoption.

The Judgment of the Subordinate Judge was confirmed and that of the District Judge modified.

Appeals were then preferred to the Judicial Committee of the Privy Council.

Sir Robert Finlay K. C. and *Brown* appeared for the representatives of Venkatanarasimha Appa Row. *DeGruyther K. C.* and *Dunne* appeared for Venkatadri Appa Row.

Sir E. Clarke K. C., Sir E. Rihards K. C., Ross K. C., and *T. Prakasam* appeared for Raja Parthasarathy Appa Row.

There were four points in the appeal.

(1) Whether the Will was genuine ?

1. (1899) I. L. R. 23 Mad. 1 at. p. 8.

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(2) Whether it authorised Papamma to adopt?

(3) Whether the adoption was effected by co-ercion and could be ratified by Papamma as the High Court found?

(4) Whether assuming the adoption to be valid the infant Narayya retained his ancestral estate or whether that estate was divested?

The second point depended on the construction of the document put forward as a will with which might be taken the petition to the Collector referred to therein. If the point were decided in favour of the appellants, it concluded the appeal. It was therefore proposed to argue it first and their Lordships acquiesced in the proposal.

Sir Robert Finlay K.C. contended that the power purported to be given to the two widows was invalid in point of law being a joint power to do an act which only one widow could perform. The effect of adoption was to render the adopted son heir to his adoptive maternal relatives. The adoptive mother was just like his natural mother. Her parents became in the eye of the law his natural grandparents. Such a relationship if created by more than one woman would lead to inextricable confusion in the law of inheritance. If a Hindu invites one of his wives to adopt with him, his other wives are postponed. The man or his wife if empowered may adopt and in cases of conflicting evidence probabilities were to be taken into account. The expression '*Maharani Sahiba*' according to the true construction of the will in which it was contained had been held not to be a collective term comprehending both widows of the testator but applied to the senior widow alone except where the expression was qualified so as to leave no doubt that both were intended. In the present case both had to exercise the power jointly. The power to adopt must be strictly carried out. The power of adoption given by the said alleged will to the two widows was invalid in point of law and even if valid it could not be exercised by Papamma after the death of her co-widow; even if the power be construed as a power to each widow to act with the consent of the other, it came to an end on the death of either, for the consent was a condition precedent and power could not be exercised until the condition was satisfied. Far from the adoption taking place during the life time of both it was not even mooted during the lifetime of Chinnamma. An authority

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to one's widow and executor to adopt had been held to be invalid. The ceremony of adoption was performed by Papamma not of her free will but under coercion and by her subsequent acts she did not and could not satisfy the ceremony of adoption and thereby render it valid against the reversioners. The motive on the part of Papamma for adoption was to avert a prosecution and to secure possession of the estate for herself and would render the ceremony void. The ceremony was performed not in due exercise of her power of adoption but in fraud thereof. Papamma believed and continued to assert in her appeals to the High Court until Dec. 1892, that she had adopted the father of Narayya and that the adoption of Narayya was contingent on the result of the said appeals and therefore the adoption was invalid against the reversioners. Venkayamma as a Hindu widow had no authority to give her husband's only son in adoption and such giving in adoption by her was invalid.

Reference was made to *Kali Komul Mozoomdar* v. *Uma Sankar Moitra* [1], *Annapurna Nachir* v. *Forbes and others* [2], *Huradhan K. Mookarji* v. *Mathuranath* [3], *Maharani Inder Kunwar* v. *Maharani Jaipal Kunwar* [4], *Chowdhri Pudum Singh* v. *Kunwar Ooday Singh* [5], *Mutsaddi Lall* v. *Kundun Lall* [6], *Montefiore* v. *Peter Browne* [7], *Baiya Rabidat Singh* v. *Maharani Inder Koer* [8], *Amrito Lall Dutt* v. *Surnomoyi Dasi* [9], *Surendra Keshan* v. *Doorgu Sundari Dasi* [10], *Akhoy Chundra Bageti* v. *Kalapjhar Haji* [11].

Macnaghten's Considerations of Hindu Law, p. 171 and App. XXI.

West and Buhler, p. 977 affords no assistance to respondents for the law in force in Bombay is against joint adoption.

Farwell on Powers 2nd edition p. 454.

Mayne's Hindu Law (7th edition), p. 144.

Sir E. Clarke, K. C., contended that the will of Narayya was proved to be genuine and the power given to the widows was

1. (1883) L. R. 10 I. A. 138.
2. (1899) L. R. 26 I. A. 246. S. C. 9 M. L. J. 209=I. L. R. 23 M. 1.
3. (1849) 4 M. I. A. 414 at 426.
4. (1888) L. R. 15 I. A. 127.
5. (1869) 12 M. I. A. 350.
6. (1906) L. R. 33 I. A. 55.
7. (1858) 7 H. L. C. 241, 263.
8. (1888) L. R. 16 I. A. 53.
9. (1900) L. R. 27 I. A. 128.
10. (1892) L. R. 19 I. A. 108.
11. (1885) L. R. 12 I. A. 198.

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valid and could be exercised by Papamma after the death of her co-widow. There is no authority for the statement that an adoption under coercion was *ipso facto* void and that under the law of contract it was only voidable. Papamma lived for many years and ratified the adoption by her conduct. The true construction of the will was that the widows had to agree on the desirability of an adoption and as soon as this was done, the senior was to adopt. The joint power to adopt was valid according to Hindu Law and must be interpreted in the sense that on the death of one the power passed on to the senior. The adoption was for religious purposes in order to provide an heir to the deceased who could perform the religious ceremonies for the good of his soul. The second adoption was perfectly valid as unlimited power to adopt was not exhausted by one adoption in case the adoptee died. The principles of the English Law regarding the power of donees to exercise the same jointly should not be applied to the Hindu Law as a gift of a Hindu of a power of disposition by his will over his estate was valid.

Reference was made to ***Annapurna Nachiar*** v. ***Forbes etc.*** [1] ***Akhoy Chunder*** v. ***Kalapahar Haji*** [2], ***Maharani Indar Kunwar*** v. ***Maharani Jaipal Kunwar*** [3], ***Kannepalli Surnayanarayaua*** v. ***P. Venkata Ramama*** [4], ***Hanuman Prasad Pandey*** v. ***Babooi Munraj Kunwari*** [5], ***Bai Motivahoo*** v. ***Bai Mamoobai*** [6], ***Bhagboti*** v. ***Kalicharan Singh*** [7],

Sir E. Richards, K. C. supported the arguments of *Sir E. Clarke, K. C.*

Sir Robert Finlay, K. C., in reply referred to ***Rani Srimati*** v. ***Khajandra Narain Singh*** [8] and *Hunterand others* v. ***Att-Ieneral and Hood*** [9].

At the time the judgment was delivered the question of costs was raised. *Sir R. Finlay* argued that costs should be given to the successful party.

[*Lord Moulton* : What order should we make ?]

[*Lord Shaw* : Is this a large estate ?]

[*Mr. Ameer Ali* : The questions were delicate and important and the parties had to come into the court to have the matter settled.]

1. (1899) L. R. 26 I. A. 252 S. C. 9 M. L. J. 209=I. L. R. 23 M. 1.
2. (1885) L. R. 12 I. A. 198.
3. (1888) L. R. 15 I. A. 127.
4. (1906) L. R. 33 I. A. 145.
5. (1856) 6 M. I. A. 393, 411.
6. (1897) L. R. 24 I. A. 93, 105.
7. (1911) L. R. 38 I. A. 64.
8. (1895) L. R. 22 I. A. 127.
9. (1899) A. C. 309, 1899, H. L.

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[*Lord Shaw*: Is there any general fund which should bear the costs?]

[*Mr. Ameer Ali*: Action was on account of the will of the testator.]

De Gruyther argued that as the dispute arose on administration, the costs should come out of the estate.

Sir E. Clarke contended that his client was successful in the Nidadavole case and obtained costs in the High Court. Costs should be given only on issues on which their Lordships had given their judgment. His client was brought in at a very late stage in the proceedings and therefore he was entitled to all costs except what would fall to the share of the issues on which judgments were given.

Lord Shaw:—The result of their Lordships' consideration is as follows. With regard to the Medur case they feel the force of the observations made by Sir Edward Clarke. The result is that the costs having been incurred on what were really the merits of the case, the consideration of which was rendered unnecessary by the determination of the point of law, upon the whole, having regard to the value of the estate and the difficulties of the enquiry, their Lordships are of opinion that *there should be no costs in the Medur case before this Board or in the Courts below.*

With regard to the Nidadavole Case, their Lordships take a different view. In their opinion the Respondents ought to keep their decree for the costs in the Court below, and with regard to the costs before this Board in that case their Lordships are of opinion that each party should pay their own costs.

Sir Robert Finlay:—With regard to the possession of the Medur estate there will be a decree that we are to have possession of one half?

Lord Moulton:—I have not before me the actual Order that will be made. There has been a mistake about what the actual order is but it follows at once from the decision that the adoption was invalid, but I wish the learned Counsel would just write down what the Order would be.

Lord Shaw:—It is necessary, I understand, that the Order should contain a certain declaration.

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Sir Robert Finlay:—Would your Lordships allow the Junior Bar on each side to assist the Registrar?

Lord Moulton:—I think that would be the best way. It will include a declaration that the adoption was not valid, but the effect of that declaration, I should think, must be also put into the Order. Will the Junior Counsel just see to that? I think it would be convenient if the Junior Counsel on each side would draft it, and send it to the Registrar.

Sir Robert Finlay:—If your Lordships please.

The judgment of their Lordships was delivered by

Lord Moulton:—The further question now for consideration in these consolidated Appeals is the ownership of the *Zamindari* of Medur. It is common ground that at one time this *Zamindari* belonged to Narayya Appa Row, the son of Venkataramayya Appa Row, who will for convenience be referred to as Narayya the younger. It is also common ground that Narayya the younger died intestate on the 4th August 1895. The points in dispute are whether at the time of his death Narayya the younger had become by adoption the son of Raja Narayya Appa Rao Bahadur Garu, who died on the 7th December 1864 (and who will for convenience be referred to as Narayya the elder), and whether if such adoption took place, it had the effect of divesting him of the *Zamindari* of Medur. In order that the Respondents in this Appeal may sustain their claim to a share of the *Zamindari* of Medur, it is necessary that they should succeed on both these points, inasmuch as their claim by inheritance from Narayya the younger depends on having been validly adopted into the family of Narayya the elder. Their claim must therefore fail if he was not validly adopted, or if, having been so adopted, he thereby forfeited his right to the *Zamindari* of Medur, which appears to have been ancestral property in his family of origin.

The alleged adoption took place after the death of Narayya the elder and was made by his widow Papamma. The Respondents claim that this adoption was a valid exercise of the powers given by the last will of Narayya the elder. The Appellants, on the other hand, contend that the power of adoption which purported to be given by the said Will was in itself invalid, and that even if the power was valid as given in the will the alleged adoption was not in accordance with that power, and was accordingly of no force or validity. If the appellants succeed in

making good either of these objections to the validity of the adoption, the whole claim of the Respondents admittedly falls to the ground, and their Lordships have therefore considered it desirable that these points should be fully argued in the first instance as preliminary points, and that they should express their opinion on them before considering the other portions of the case.

The Will of Narayya the elder is dated the 6th day of December 1864, *i.e.*, immediately previous to his death. He was a member of the Velama branch of the Sudra caste. He had two wives named respectively Papamma and Chinnamma. So much turns upon the language of this Will that it is advisable to cite it in full. It reads as follows:—

"As my illness increased, and as I think I would not survive, you both should "divide in equal shares my Zamindari Nidadavole and Bahargalli parganas and "Amberpet paragana, the cash in the upstair building and all other moveable and "immoveable property. It has been arranged that my nephew (sister's son) "Chiranjivi Vellanki Venkatakrishna Row should enjoy hereditarily from son to "grandson the profits of the village of Mandur attached to Amberpet Muttah, and "also of Nagulapalli and Rajupotepalli villages attached to the Taluqdari, and that "my brothers-in-law Vellanki Jagannadha Row Garu and Vellanki Sura Row Garu, "should enjoy hereditarily the profits of the village of Undrajavaram attached "to Nidadavole pargana paying every year the peishoush fixed therefor at the sub- "division according to the kist bund (instalments). You both should maintain "our samastanam, servants, clerks, dasis and other servants. You should "for the most part live in harmony with my younger brother Chiranjivi Venkatadri "Appa Row. You should adopt a boy who is our sannihita (one closely related) "whenever it strikes you that our samasthanam should continue. In all matters "both should act without quarrelling I have this day alone caused a petition to "be written and sent to the Collector of Godavari in regard to this matter. You "both should without fail act according to the aforesaid paddhatis (terms)."

The Will is signed by the testator and witnessed by four witnesses, and under their names come the words:—

"We both have agreed to act according to the aforesaid terms."

and this is signed by Papamma and Chinnamma.

Chinnamma died in 1881. It was not until the year 1885 that any steps were taken with regard to the adoption of a boy, but in that year the surviving wife Papamma purported to adopt Venkataramayya, the father of Narayya the younger. This so-called adoption of Venkataramayya was declared by the Court to be invalid, and thereupon in the year 1890 Papamma purported to adopt Narayya the younger.

The Appellants contend that the proper construction of the language of the Will is that, it gives a joint power of adoption to the two wives to be exercised when they shall think it

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desirable that testator's *samastanam* should continue. They contend that such a joint power of adoption is in itself invalid, inasmuch as only one wife can adopt and they further say that, even if this be not so, the occasion for the exercise of the power is when the two wives should jointly decide that it was desirable that the family should be continued, and the act must then be the joint act of the two wives. If this be so, it follows that the power could not be exercised after the death of one of the two wives, since thereafter there could be neither agreement nor joint action.

It is somewhat difficult to set out precisely the contentions of the Respondents on these points. Their Counsel admit that while both the widows were living no adoption could take place without the consent of both. But they contend that the proper interpretation of the language of the Will is that when the two widows should agree on the desirability of adoption taking place and on the person to be adopted, the adoption should be carried out by one of the widows (preferably the first wife) who would thereby become in law the mother of the adopted child. They contend that a joint power of adoption is valid by Hindu law and must be interpreted in the above sense, and, further, that on the death of the one widow the power both of choice and adoption would, under the terms of the Will, pass to the survivor.

Before examining the validity of these contentions it will be well to clear up one or two points upon which their Lordships are of opinion that no reasonable doubt can exist.

In the first place there could be no power of adoption by either or both of the widows in the present case excepting such as might be derived from the powers given by the Will. In this part of India, at all events, a widow has no power to adopt a son to a deceased husband excepting by express authority given by him in his lifetime or by will. In the next place only one wife can receive the child in adoptiion so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance.

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But it does not follow as a matter of necessity from these considerations that a power given to more than one wife to adopt must be an invalid power. In many matters custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view. In the very question that is before their Lordships there are indications in the cases cited that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the first wife. But their Lordships are of opinion that the validity of a joint power of adoption and its interpretation are questions of far-reaching importance in Hindu Law and that in the present case the materials for deciding them are very insufficient. They would greatly regret to find themselves compelled to decide such questions on imperfect materials and inasmuch as in the view which their Lordships take of this case it is not necessary that these points should be decided they desire to express no opinion upon them, and will assume for the purposes of their decision that the Respondents are right in their contention that such a joint power of adoption given to the two widows was, if properly interpreted, a valid power, and that if they had agreed to a person to be chosen for such adoption they could have validly executed the power.

There remains the second point, *i, e.,* whether the power given by the Will was exerciseable by the surviving widow alone after the death of the other.

The arguments of the Appellants on this point are that upon a proper construction of the Will it gives a joint power to the two wives to be exercised when they jointly come to the conclusion that it is desirable that it should be exercised, and that it should then be exercised only in case of a boy to be chosen by them jointly. As a mere matter of construction their Lordships are of opinion that the appellants are right in this contention and in an ordinary case of the giving of a joint power to two donees the legal consequences claimed by the Appellants would follow.

But the Respondents claim that this must not be treated as a mere question of construction. They submit that the continuation of the line of the testator must be taken to have been for religious purposes in order that he might have the advantages of an heir who could perform the religious ceremonies affecting his future life. They therefore

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contend that this Board should put aside all rules of law prevailing in England with regard to joint donees of a power and should, as a matter of judicial duty, give effect to the intention of the testator with respect to procuring for himself an heir by adoption, and not permit that intention to be defeated by its becoming impossible of execution by the two donees jointly by reason of the death of one of them.

Their Lordships are of opinion that this reasoning is unsound. In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, *i.e.*, to construe the Will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the possession of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. "The Court is entitled to put itself into the testator's armchair." Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the court never adds to a Will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the Will as properly construed, and this duty is universal, and is true alike of Wills of every nationality and every religion or rank of life.

This fundamental principle does not clash with the principle that the Court will not necessarily apply English rules of construction to such a Will as we have here to deal with. These

rules of construction amount in many cases to nothing more than saying that a special phrase which may be used in more than one sense shall *prima facie* be deemed to be intended to bear one particular meaning, unless from the consideration of the context or the surrounding circumstance, the court can come to the conclusion that it is there used in a different sense. In other cases the rules are the expression of such tendencies in the Court as the desire to avoid an intestacy or the presumption in favour of immediate vesting of an estate. Such rules are purely an English product based on English necessities in English habits of thought, and there would be no justification in taking them as our guide in the case of Indian Wills. Nor does this fundamental principle clash in any way with what is sometimes called "giving a liberal interpretation" to Native Wills. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the "surrounding circumstances" which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained they must not be departed from.

Applying these principles, their Lordships have to ascertain the true intentions of the testator from the language used in the Will. The words are "You should adopt a boy who is our "*sannihita* (one closely related) whenever it strikes you that our "*samastanam* (family) should continue." Such an adoption would have effects of two very different kinds. In the first place it would provide someone who would offer the customary oblations for the good of the soul of the testator, and in the second place it would change the succession of the property. The devolution after the death of the widows would no longer be to the persons entitled to succeed on an intestacy, but to the heirs of the person adopted. Counsel for the Respondents would have us regard the religious motive as the overmastering one, so that the intentions of the testator must be treated as if they were dictated by it alone. Their Lordships fully appreciate how strong such a motive may be expected to be in the mind of a Hindoo. But in their Lordships' opinion the language of the testator points to the predominance of the secular motive.

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He does not direct that there shall be an adoption, as he would naturally have done had he wished in all events to secure that there should be a son to perform the due religious rites. He makes it depend on the opinion of his widows whether and when an adoption should take place. It is common ground that the occasion for an adoption would not arise in the lifetime of the two widows unless they both agreed to use the power, and there is nothing which indicates any intention to interfere with their freedom of choice in the matter, whether the true interpretation be that the power was joint or several.

But this does not exhaust the material which we have for arriving at the testator's true intentions. In judging of the light in which the directions of the testator are to be regarded, it is legitimate to look at the contemporaneous document referred to in the will which he wrote or caused to be written with the express intent to render clear his wishes with regard to his succession. This document has, of course, no testamentary effect, but it is legitimate to look at it as one of the surrounding circumstances in order to test the soundness of the principle of interpretation pressed upon us by Counsel for the Respondents. In the Will the testator writes: "I have this day alone caused a "petition to be written and sent to the Collector of Godavari "in regard to this matter." This petition, which is signed by the testator and bears the same date as the Will, is substantially a repetition of it, though the language is not precisely the same. The passage relating to adoption reads thus: "That, if it should strike them (*i. e.*, his "widows) to continue the *Samastanam*, they "should adopt a boy who is my *sannihita.*" This language emphasizes that which is expressed also in the Will, *viz.*, that the adoption should only take place if and when they thought it desirable that such should be the case, or in other words if and when they thought it desirable that the succession to the property should be changed. Had the testator been moved by an overmastering religious motive to secure that there should be someone to act as his son after his death, it is inconceivable that he would have used such language or made such provisions relating to the future adoption of a son. He would have directed that an adoption should take place and not left it to depend on the problematical concurrence of his widows in their views as to its desirability.

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For what it is worth, it is clear that this was the interpretation put upon the Will by the widows themselves. It will be remembered that they signed the Will at the date of its execution and promised to act according to its terms. Three days after this they write to the Collector of Godavari referring to these provisions of the Will in the words "and that if it should strike "us that the *samasthanam* should continue we should adopt a "a boy who is our *sannihita.*" The tetsator died in 1864. His widow Chinnamma died in 1881 leaving Papamma surviving her. It is not until 1885, four years after the death of Chinnamma, that any steps to adopt a boy are taken. It is clear therefore that the widows who were acquainted with the provisions of the testator's Will at the time and undertook to carry them into effect did not interpret them as doing more than leaving them quite free to adopt or not as they might think desirable.

Their Lordships are therefore of opinion that in the present case there is nothing which requires or justifies them in interpreting the provisions of the Will with regard to the adoption in any special way arising from the fact that the testator was a Hindu. They must adhere to the plain meaning of the language used. So construing it they are of opinion that it gives to the widows jointly the power to adopt a son should an occasion arise which in their opinion makes it desirable so to do. The power is a joint power and the occasion on which it is to be exercised depends on their joint opinion. In other words, the exercise of the power is vested in the discretion of the joint donees. Now it is clearly the law that in such a case the death of one of the donees puts an end to the joint power. This is not by virtue of any peculiar doctrine of English law or of any series of English decisions. It flows from the nature of a joint power. If power is given to A and B *personæ designatæ* to do an act if and when they think it desirable, the occasion cannot arise nor can the power be exercised unless they are both living and in agreement as to the act. This cannot be the case after the death of one of them and the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague nor can he then do the act, seeing that the authority to do it is only given to the two acting jointly. The case is different when the power is vested not in *personæ designatæ* but in the occupants for the time being of a

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specified office such as executors or trustees, but that is not the case which we have to consider here.

The point may perhaps be put in a simpler form not involving any appeal to legal doctrines as to joint donees of a power. Their Lordships are of opinion that the words of the Will when properly construed relate to choice and adoption by the two widows acting jointly. Hence those words refer only to the period of time when both widows are living. The Will is silent as to the period after the death of one of the widows and if their Lordships were to hold that Papamma could adopt a son after Chinnamma's death they would be providing for a period of time which the testator left unprovided for, and unnoticed in his Will, *i.e.*, they would be making an addition to his testamentary dispositions which is a thing that no Court is entitled to do.

It follows therefore that at the death of Chinnamma the power to adopt given to his widows by the testator came to an end, and therefore the alleged adoption of Narayya the younger is of no validity.

On the consolidated Appeals (Judgment in one of which has already been delivered on the 24th July 1913) their Lordships will therefore humbly advise His Majesty to affirm the Decree of the High Court of Madras dated the 20th November 1905 so far as it dismissed with costs Appeal No. 32 of 1904, and to reverse the said Decree and the decree of even date therewith so far as they dismissed with costs Appeals No. 122 and 123 of 1900, and allowed with costs Appeal No. 41 of 1904, and that it ought to be declarad that the adoption of Narayya Appa Row the son of Venkataramayya Appa Row the *Zamindar* of Medur and Venkayamma Row his wife by Papamma the widow of Narayya Appa Row the *Zamindar* of Nidadavole was invalid, and that on the death of Venkayamma Row, Rangiah Appa Row and Venkata Narasimha Appa Row, both now deceased, became entitled as reversionary heirs to the estate of Medur and the lands and moveable properties appertaining thereto, and further that the said estate and the lands with mesne profits and the moveable property appertaining thereto, ought to be divided into moieties between the Appellants, viz: (1) Venkatadri Appa Row, the only son of the said Rangiah Appa Row, as to one such moiety, and (2) Meka Venkataramayya Appa

Row and Sobhanadri Appa Row, the two sons of Venkata Narasimha Appa Row, as to the other moiety.

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With regard to the costs their Lordships think that as to the Nidadavole estate there ought to be no costs in the Privy Council, and as to the Medur estate there ought to be no costs either in the Privy Council or in the Courts below.

Solicitors for the representatives of Raja Narasimha Appa Row:—T. L. Wilson & Co.

Solicitors for Raja Parathasarathy Appa Row: Chapman—Walker and Shephard.

Solicitor for Raja Venkatadri Appa Row. Douglas Grant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH].

Present:—Sir Charles Arnold White, Chief Justice, Mr. Justice Sankaran Nair, and Mr. Justice Olfield.

The President, Vakils' Association, High Court, Madras — *Petitioner*,*

v.

A Vakil of the High Court — *Respondent.*

In the Matter of a High Court Vakil.

Letters Patent, Section 10—Vakil—Glorification of himself and his professional power—Professional misconduct—Suggestion that he is in a position to influence Judge by improper means.

A mere glorification by a vakil of himself and his professional powers may not constitute professional misconduct; but to suggest that he is in a position to influence the judge by indirect and improper means is professional misconduct meriting more than mere warning.

Petition praying that in the circumstances stated therein, the High Court will be pleased to take action in the matter of the conduct of a vakil of the High Court under clause 10 of the Letters Patent.

The Petitioner in person.

M. O. Parthasarathi Aiyangar, for the Vakil.

The Hon'ble the Advocate General (F.H.M. Corbet) amicus curiae.

The Court made the following

* C. M. P. No. 585 of 1914. 20th March, 1914.

In the Matter of a High Court Vakil.

Order :—This matter comes before us on a resolution of the Council of the Vakils' Association with reference to a letter written on the 23rd July 1912 by a Vakil of this Court. By direction of this Court the matter was inquired into by the Council of the Vakils' Association and the Vakil was asked by the Council to submit an explanation that he might have in connection with the writing of this letter. At a meeting of the Council of the Association held on the 22nd February 1913 the following resolution was passed: "Resolved that taking all the facts in the explanation to be true, this council is of opinion that the Vakil is guilty of grave professional misconduct in writing the letter dated 23rd July 1912 to S. Madhuvaier, private Vakil, Kumbakonam. It is therefore requested that this Honourable Court may be graciously pleased to take action against the said Vakil under S. 10 of the Letters Patent".

In dealing with this case we proceed on the same assumption as that adopted by the Vakils' Association namely, that "the facts in the explanation are true." The letter as translated is in these terms.

" Please destroy this after perusal. Many crores of prostrations. Your letter to hand: I am glad I have got it." (This sentence, " Your letter to hand. I am glad I have got it," does not appear in the translation of the letter which is before us, but we may take it that this is an accurate translation of the sentence. It is the translation suggested by the Vakils' Counsel, Mr. Parthasarathi Aiyangar.) Then the letter goes on: " The Thirukkalavoor incendirarism case is to come on for trial before Singaravelu Mudaliar Avergal the Sub-Magistrate. The said Mudaliar was a Sub-Magistrate here at Tanjore. He was previously the Sub-Magistrate of Kumbakonam Town. He was a particular friend of mine when he was here. I need not write to you more. You will know it if you go over here to the town and make enquires. I shall by all means positively secure advantage to our side. However great be the Vakil that may appear what I shall be able to achieve before the said Sub-Magistrate will be different. I shall tell you that if you come in person. I intend going to Mannargudi on the 30th instant. You may see me positively if you come here on Friday the 26th instant. Or if you intimate the time of your arrival I shall remain in town. I may perhaps go to Kumbakonam on the 25th instant. I shall then

see you. I intend going to Mannargudi on the 27th instant. We shall surely succeed in the aforesaid case, and there need be no anxiety. Please get me engaged as Vakil. Ask the Sub-Magistrate too, if you please. I solicit a reply in any case." The explanation of the vakil which we take to be true as regards all statements of facts, is this:—

" In regard to the letter dated 23-7-1912 I beg to state as follows:—About June end or July beginning 1912 Mr. Madhuvaier a private vakil approached me on behalf of Thiruklavoor party in what is called the Thiruklavoor arson case, and proposed certain terms which I accepted. As he had not brought the records with him he said he would go to me subsequently with the party and the records. A few days later, Mr. Madhuvaier wrote to me a letter which unfortunately I have not preserved to the following effect as far as I am able to recollect its contents:—" The clients agreed to engage you on the terms settled but are now hesitating on the ground of some information that the old Magistrate has been transferred and the new Magistrate is said to have had a difference and consequent misunderstanding with you. The informant seems to have said that the Magistrate himself gave him the information. The clients are afraid that they might lose a good case by engaging one who was not on good terms with the Magistrate. I assured the clients that it could not be so but they were still hesitating and considering if it would not be better to go to a vakil of longer standing. Please write to me if the information is untrue and also what you think of the case. I shall speak to the clients and then go to you with them." It was in reply to this letter that I wrote the letter to question. I had a difference with one Mr. E. Singaravelu Mudaliar, Sub-Magistrate of Valangiman but not with the Singaravelu Mudaliar who was to be new Magistrate of the Court. My relations with the latter were good and were known to be such at Tanjore where he was previously Magistrate. Far from the case being lost to the clients by engaging me I thought I would be more advantageous to the party as I had appeared before him on previous occasions and known his ways and as I had accidently come to know of certain facts regarding that case which would be useful to the party and which would not be available to others. This was what I conveyed in the letter in question and asked him to go and see me with a view to tell him

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what information I had about the case. I also told him that he might verify from the Magistrate himself that I had no difference and no misunderstanding with him. As the letter was a reply to Mr. Madhuvier's to remove a misapprehension I advised him to tear it off."

The Vakil has been represented before us by a very experienced Advocate of this Court. The Advocate General was requested to appear in support of the notice to show cause. He has, however, as *amicus curiae* urged before us that this is a case in which we ought not to take action under the Letters Patent. We have considered the letter with great care by the light of the explanation. If I could read the letter as nothing more than a statement that the report referred to in the letter to which the letter of the Vakil purports to be a reply was unture, and if the rest of the Vakil's letter could be regarded as nothing more than a glorifying of himself and of his own professional powers, I may be of opinion that the letter though not in good taste, did not constitute an act of professional misconduct. To my mind, however, the letter is something a great deal more than a statement that it was not true that the relations between the Vakil and the Magistrate who was about to try the case in which the Vakil hoped to appear were strained, with some boastful observations thrown in. As I read the letter it appears to me that the writer of the letter intended to convey to the mind of the private vakil to whom the letter was written that the writer was in a position to influence the Magistrate by indirect and improper means. If that is the right view of the letter, no one can contend for one moment that it does not constitute an act of professional misconduct on the part of the Vakil.

Having arrived at the conclusion that the Vakil was guilty of an act of professional misconduct we have considered whether we can accede to the request put forward by Mr. Parthasarathi Iyenger that a caution to the Vakil would meet the requirements of the case. We find ourselves unable to accede to the request. We have come to the conclusion that the imposing of a period of suspension is necessary, and the order of the Court is that Mr. * * * * a Vakil of this Court be suspended from practice for three months from this date.

Sankaran Nair : *J* :—I agree

Oldfield J :—I agree,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Abdul Kadir Rowther and another ... *Appellants.*

v.

Krishna Malamal Nair Karnavan and Managar of the tarwad ... *Respondent.*

Limitation Act (Act IX of 1908) art. 182, Cl. 5—Oral application for adjournment—To get encumbrance certificate in respect of the attached property—Application to take a step in aid of execution.

An oral application for adjournment made for the purpose of getting an encumbrance certificate in respect of the attached property is an application to take a step in aid of exeoution and would save limitation under art. 182 Cl. 5.

Appeal from the order of the District Court of South Malabar in A. S. No. 904 of 1911 perferred against the order of the Court of the Subordinate Judge of South Malabar at Palghat in E. P. No. 751 of 1911 (O. S. No. 40 of 1903).

K. Naraina Rau for Appellant.

T. R. Ramachandra Aiyar and N. A. Krishna Aiyar for Respondant.

The Court delivered the following

Judgment:—*Sadasiva Aiyar, J*:—Unless the oral application for an adjournment of the hearing of a previous execution petition, made by the decree-holder on the 7th August 1908 is held to be an application to take a step in aid of execution, the present execution application of 3rd July 1911 is clearly barred by limitation. The question is not free from difficulty. In *Kartick Nath Pandey* v. *Jaggannath Ram Marwari* [1] there is an ***obiter dictum*** showing that an application for adjournment to enable the decree-holder to conduct his petition further with effect is not an application to take a step in aid of execution. A different view was taken in *Mowar Narasingh Dayal Singh* v. *Mowar Kalicharan Singh* [2] where the point directly arose.

The learned vakil for the judgment-debtors (appellants before us) sought to distingush *Mowar Narasingh Dayal Singh* v. *Mowar Kalicharan Singh* [2] from the present case on two grounds.

(*a*) That the application for adjournment relied on in *Mowar Narasingh Dayal Singh* v. *Mowar Kalicharan Singh* [2] was in writing and not oral. (*b*) That the application in that case was an application for an adjournment to enable the decree-holder to produce an affidavit as evidence to carry on those execution proceedings further whereas it was not so in the present case.

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* C. M. S. A. No. 5. of 1913. ... 19th December 1913.

1. (1899) I. L. R. 27 C. 285
2. (1910) 14 C. W. N. 486.

Abdul Kadir v. Krishna.

I think that neither of these contentions is sound. There is nothing in article 179 of the Limitation Act which requires the application to take some step in aid of execution to be in writing. *Amar Singh* v. *Tika* [1] *and Manekklal Jagjivan* v. *Nasia Radha* [2] are direct authorities to the contrary and I am prepared to follow them. Then as regards the other distinction sought to be made I am unable to see that the application for an adjournment to enable the decree-holder to produce affidavit evidence in aid of further proceedings (which was the application in *Mowar Narsingh Dayal Singh* v. *Mowar Kali Chan Singh*[3]) stand son a better footing than an application for an adjournment to enable the decree-holder to produce an encumbrance certificate in respect of the attached property in aid of further proceedings in execution. Then reliance is placed by the appellant's vakil on the reason given in the *obiter dictum* in *Kartick Nath Panday* v. *Jaggirnath Ram Marwari* [4]. That reason is that an application for adjournment is in retardation of the execution proceedings and not in aid of the execution proceedings. I think there is a fallacy in this reasoning. When an application for adjournment is made by the judgment-debtor, it is almost invariably to retard the execution proceedings. As regards an application by the decree-holder it may be one of three things. (*a*) It may be to get an order in aid or (*b*) It may be to get an order in retardation or (*c*) It may be to get an order which is neither. An application by the decree-holder to give time to the judgment-debtor merely as a matter of grace is a step in retardation. An application for an adjournment to enable the decree-holder to produce records or evidence necessary to effectively conduct the execution proceedings further will be an application to get an order in aid. *Seshadasa Charya* v. *Bhimacharya* [5] *Haridas Nanabhai* v. *Vittaldas Kisandas* [6] *Pitam Singh* v. *Tota Singh* [7] and *Kunhi* v. *Seshagiri* [8]. An application by the decree-holder to draw money deposited in court or to obtain copies of sale lists (without anything to indicate that they were necessary to aid further execution) will be an application neither in aid nor in retardation. In the present case, I think that the application for an adjournment was for an order in aid. I think that the

1. (1880) I. L. R. 8 A. 139.
2. (1890) 15 B. 405 at p. 407
3. (1910) 14 C. W. N. 486.
4. (1899) 2 7 Cal. 285.
5. (1912) I.L.R. 37 B. 317 S.C.14 B.L.R. 1204.
6. (1912) I. L. R. 36 B. 638.
7. (1907) L. R. 29 All. 301 at p. 302.
8. (1882) I. L. R. 5 M. 141.

of applying for execution as one of the starting points, limitation for calculating the 3 years' period for the subsequent application in execution instead of the date which the proceedings in the previous application for execu *terminated*, and I should be glad if the Limitation Act is amer so as to fix the latter date. But the harshness is mitigate some extent by allowing the date of applying to take a step aid to be also a starting point and I think that if even an application is really for an order which will be a step in aid (not merely for an order which will be indifferent or retarding liberal interpretation should be put on article 179 so as to en the decree-holder to obtain the fruits of his decree.

In the result I would dismiss the appeal with costs.

Spencer, J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADR

Present:—Mr. Justice Sadasiva Aiyar and Mr. Jus Seshaghiri Aiyar.

T. R. M. T. Subramanian Chettiar — *Appellant (Plaintiff)*

v.

Periasami Thevar and another — *Respondent (Defendants*

Estates Land Act, S. 151—Joint owners—Suit by one co-owner making the (party defendant—Maintainability of—Transfer of tenant's interest to the co-owner—Remedy—Suit for joint possession or partition—Revenue Courts—No ju diction to order.

Where in a suit brought by a co-owner against a tenant under S. 151 o: Estates Land Act making the other co-owner a party defendant, it was found at the date of the suit the interest of the tenant had vested in the latter by tr fer

Held, that the suit, though not liable to dismissal on the ground that the co-owners were not party plaintiffs, should nevertheless be dismissed as remedy of the plaintiff under the circumstances was to sue either for joint posses or for partition for neither of which reliefs a suit is maintainable in the Reve Court

Second appeal from the decree of the District Court of Ra nad in A. S. No. 598 of 1910 preferred against the decision of Court of the Special Deputy Collector of Ramnad in Summ Suit No. 1762 of 1910.

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In the result I would dismiss the appeal with costs.

Spencer, J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justic Seshaghiri Aiyar.

T. R. M. T. Subramanian Chettiar — *Appellant* * (*Plaintiff*)

v.

Periasami Thevar and another — *Respondents* (*Defendants.*)

Estates Land Act, S. 151—Joint owners—Suit by one co-owner making the othe party defendant—Maintainability of—Transfer of tenant's interest to the othe co-owner—Remedy—Suit for joint possession or partition—Revenue Courts—No juris diction to order.

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Second appeal from the decree of the District Court of Ram nad in A. S. No. 598 of 1910 preferred against the decision of the Court of the Special Deputy Collector of Ramnad in Summary Suit No. 1762 of 1910.

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* S. A. No. 425 of 1912. — 18th March 1914.

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In the result I would dismiss the appeal with costs.

Spencer, J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshaghiri Aiyar.

T. R. M. T. Subramanian Chettiar — *Appellant* * (*Plaintiff*)

v.

Periasami Thevar and another — *Respondents* (*Defendants.*)

Estates Land Act, S. 151—Joint owners—Suit by one co-owner making the other party defendant—Maintainability of—Transfer of tenant's interest to the other co-owner—Remedy—Suit for joint possession or partition—Revenue Courts—No jurisdiction to order.

Where in a suit brought by a co-owner against a tenant under S. 151 of the Estates Land Act making the other co-owner a party defendant, it was found that at the date of the suit the interest of the tenant had vested in the latter by transfer

Held, that the suit, though not liable to dismissal on the ground that both the co-owners were not party plaintiffs, should nevertheless be dismissed as the remedy of the plaintiff under the circumstances was to sue either for joint possession or for partition for neither of which reliefs a suit is maintainable in the Revenue Court.

Second appeal from the decree of the District Court of Ramnad in A. S. No. 598 of 1910 preferred against the decision of the Court of the Special Deputy Collector of Ramnad in Summary Suit No. 1762 of 1910.

Abdul Kadir v. Krishna.

legislature is a little harsh on decree-holders in fixing the ***date of applying*** for execution as one of the starting points, for limitation for calculating the 3 years' period for the next subsequent application in execution instead of the date on which the proceedings in the previous application for execution ***terminated***, and I should be glad if the Limitation Act is amended so as to fix the latter date. But the harshness is mitigated to some extent by allowing the date of applying to take a step in aid to be also a starting point and I think that if even an oral application is really for an order which will be a step in aid (and not merely for an order which will be indifferent or retarding) a liberal interpretation should be put on article 179 so as to enable the decree-holder to obtain the fruits of his decree.

In the result I would dismiss the appeal with costs.

Spencer, *J*:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshaghiri Aiyar.

T. R. M. T. Subramanian Chettiar — ***Appellant*** * ***(Plaintiff)***

v.

Periasami Thevar and another — ***Respondents (Defendants.)***

Subramanian Chettiar v. Periasami Thevar

Sadasiva Aiyar J.

Estates Land Act, S. 151—Joint owners—Suit by one co-owner making the other party defendant—Maintainability of—Transfer of tenant's interest to the other co-owner—Remedy—Suit for joint possession or partition—Revenue Courts—No jurisdiction to order.

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* S. A. No. 425 of 1912. 18th March 1914.

Subramanian Chettiar v. Periasami Thevar.

Sadasiva Aiyar J.

S. Srinivasa Iyengar for Appellant.

C. V. Ananthakrishna Iyer for Respondent.

The Court delivered the following

Judgment:—*Sadasiva Aiyar, J.*—Plaintiff and the 2nd defendants are co-sharers of the melwaram right in the plaint land according to the plaint allegations. As the suit has been dismissed on a preliminary point, we have to accept only the plaint allegations with any facts admitted on both sides in order to see whether the dismissal is legally sustainable. 1st defendant was the occupancy tenant of the plaint land. It is not denied that he had sold the land to the 2nd defendant a few days before the suit was instituted in the Court of the Special Deputy Collector of Ramnad. Thus on the date of the suit, the 2nd defendant owned a half share in the melwaram right and the whole of the Kudivaram right. The question is whether the plaintiff who owns the other half share in the melwaram right, can maintain this suit in the Revenue Court for ejectment and obtain a decree for possession of the land on behalf of himself and the 2nd defendant.

The suit as framed was, no doubt, for the ejectment of the 1st defendant, ignoring the sale to the 2nd defendant by the 1st defendant and the transfer of possession by the 1st defendant to the 2nd defendant. We may take it that the sale was unknown to the plaintiff. When he brought the suit but, yet as the sale and delivery had, as admitted, before the Deputy Collector at the time of hearing, taken place before the suit was instituted, the rights of the parties have to be decided upon as these rights stood on the date of the plaint and in the light of the facts which had taken place before the date of the plaint.

The ground on which the lower Courts have dismissed the suit is that as the plaintiff's co-sharer (the 2nd defendant) did not join the plaintiff in bringing this suit, the plaintiff alone cannot maintain this suit to eject the 1st defendant (the tenant) and reliance is placed on *Gopal Ram Mohuri* v. *Dhakeshwar Pershad Narain Singh* [1] in support of the above view by the lower Appellate Court. I have dissented from some of the observations in *Gopal Rao Mohuri* v. *Dhateshwar Pershad Narain Singh* [1] in the decision referred to by my learned brother in his judgment. I have dissented from those observations in that case which

1. (1908) I. L. R. 35 C. 807.

Subramanian Chettiar v. Periasami Thevar

Sadasiva Aiyar J.

S. Srinivasa Iyengar for Appellant.

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support the view that one of several joint lessors cannot put an end to the demise even in respect of his own share of the land held in common. Further, this is not a case of a landlord putting an end to the tenancy, but it is a case of a landlord suing on a statutory right given by S. 151 of the Madras Estate's Land Act to eject a tenant on account of the latter's having constructed a house upon the land held by him as a tenant for agricultural purposes and thereby having made it unfit for agricultural purposes. I do not think that cases relating to the forfeiture of tenancy under the ordinary law can throw much light on this question. The Madras Estates Land Act does not say that the tenancy is forfeited or that the tenant ceases to be a tenant when he commits the acts mentioned in S. 151. Under the Madras Estates Land Act, even the denial of the landlord's title is no ground for ejectment, and Ss. 151, 152 and 153 show that a tenant who has incurred liability to be ejected is still called a tenant till a decree is passed for ejectment in the suit brought by the landlord. Though I am unable to support the dismissal of the suit on the ground on which the lower courts have based such dismissal, I think the dismissal of the suit can be justified for the reasons which I shall now proceed to state. As it is admitted that there had been a sale to the 2nd defendant before the suit was brought and as the 1st defendant had ceased to have possession of the plaint plot on the date of the suit, there was really no cause of action vested in the plaintiff to sue the 1st defendant in ejectment on the date of the suit. No doubt, the plaint can be allowed to be amended by converting the prayer for the ejectment of the 1st defendant into a prayer for the ejectment of the 2nd defendant. But the questions to be considered before allowing such an amendment are (1) "Is the plaintiff entitled to eject the 2nd defendant, who is a co-sharer in the melwaram right alone with the plaintiff and who is now the owner of the whole kudivaram right" (2) "Is such a suit maintainable in a Revenue Court.

S. 8 of the Madras Estates Land Act begins with the words "The merger of the occupancy right under sub-sections 1 and 2". This implies that some merger of the occupancy right takes place when the circumstances mentioned in sub-sections 1 and 2 occur. Sub-section 1 relates to the entire interests of the landholder and the occupancy right becoming united by transfer, succession or otherwise in the same person. In such a case

Subramanian Chettiar v. Periasami Thevar

Sadasiva Aiyar, J.

there can be no doubt that there is a merger of the occupancy right. Sub-section 2 relates to a case where the occupancy right has been transferred to a person jointly interested in the land as landholder. In such a case the whole occupancy right cannot be merged as the person to whom the whole occupancy right was transferred, was only a landholder in part; but under the general law, a fraction of the occupancy right corresponding to the fraction of the landholder's right (vested in the purchaser) must become merged in the latter. In the present case, therefore, when the 2nd defendant purchased the 1st defendant's Kudivaram right in the whole plot, the occupancy right in a half share became merged in the half share of the melwaram right belonging to the 2nd defendant and the other half of the occupancy right remained without merger in the 2nd defendant. Supposing that this suit for ejectment of the 1st defendant from the whole of the land is converted by amendment into a suit for ejecting the 2nd defendant from the whole of the lands, even then this suit must fail because the 2nd defendant has become entitled to both the melwaram and the kudivaram in half the land and is entitled to remain in possession of at least that half share. It may be argued that the suit might be amended as a suit for the joint possession of the land with the 2nd defendant. Then, apart from the question raised in certain Calcutta decisions whether the proper course for a co-sharer is not to sue for partition and separate possession under such circumstances, there arises the preliminary difficulty whether the Revenue Court can entertain such a suit for joint possession. I do not think that a suit for joint possession is contemplated as within the jurisdiction of the Revenue Court under S. 151 of the Madras Estates Land Act as that section contemplates a suit for *Khas* possession ejecting a tenant as such; nor can the suit be amended as for partition and possession of half share as such a suit cannot also be maintained in a Revenue Court. The right of one co-sharer against another co-sharer seems to have been recently considered by *Sankaran Nair* and *Ayling JJ.* in *Muthiah Chetty and others* v. *Subramanian Chetty and others* 1. S. A. No. 1600 of 1911 and, though reasons are not given for the decision, the lower appellate courts' decision, was confirmed and it is clear from the printed papers that it was held by the lower Appellate Court that even a trespasser building upon a land belonging to two

co-sharers cannot be enjoined by a mandatory injunction at the suit of only one of the co-sharers if the trespasser had, before the suit, acquired the right of the other co-sharer and if the extent of the land built upon by him was less than what would fall to him on a partition. In *Sreemutty Basanta Kumari Dassi* v. *Mahesh Chandra Shaha* [1] it has been decided that a decree for joint possession can be given to a co-sharer only in exceptional cases. On the whole, therefore, I think that the suit brought in the Revenue Court and framed as a suit to eject the 1st defendant who was not in possession on the date of suit was rightly dismissed and I would dismiss this second appeal but without costs.

Seshaghiri Aiyar, J. The plaintiff and the 2nd defendant are the proprietors of the village of Thavasikudi. The 1st defendant is a ryot of the village. The plaintiff's case is that the 1st defendant built a house on a portion of the holding which is cultivable land on the 29th of May 1910 and has thus rendered himself liable to be evicted. The 1st defendant's plea is that he had put the 2nd defendant in possession of the property under an agreement to sell, that he himself did not erect any building and that there is no cause of action against him. The 2nd defendant states that he erected the building complained of.

As on the first hearing we had no information regarding the date on which the 2nd defendant became the purchaser. we asked the learned Vakils appearing in the case to ascertain that fact We are informed that the sale was on the 15th June of 1910. This suit was brought on the 17th June. It is thus clear that when the suit was instituted the 2nd defendant had purchased the kudivaram right in the plaint property.

The courts below dismissed the plaintiff's suit on the sole ground that one co-sharer land-holder was not entitled to maintain a suit to eject the tenant of the holding and they relied upon *Gopal Ram Mohini* v. *Dhakeshwar Pershad Narain Singh* [2] for this position. I am clearly of opinion that this view is incorrect. In this High Court there has been a course of decisions to the effect that one trustee can maintain a suit as against a stranger making the other co-trustees party defendants. In the case of co-sharers also there are decisions to the same effect. If the plaintiff's case is true, the 1st defendant forfeited his right

1. (1913) 18 C. W. N. 328. 2. (1908) I. L. R. 35 C. 807.

Subramanian Chettiar v. Periasami Thevar

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to property by committing waste, and he became a trespasser liable to be evicted at the instance of the persons entitled to the property.

The decision in *Gopal Ram Mohuri* v. *Dhakeshwar Pershad, Narain Singh* [1] is opposed to the view taken in *Sri Raja Simhadri Appa Rao* v. *Pratipathi Ramayya* [2] and in *Korapalu and another* v. *Narayana* [3] The case of *Jatindra Nath Chowdhri* v. *Prasana Kumar Banerjee* [4] related to the enhancement of the rent. That does not affect the decision in this case. For it is a well-recognised principle of law that one co-sharer alone cannot maintain an action to increase the burden upon the tenant. The tenant entered into a contract with all the landholders as a body and the contract rests upon the consent of every co-sharer, and so long as there is no severance of the interests of the co-sharers either by partition or by some other arrangement the tenant is entitled to say that the concurrence of all the parties should be obtained for increasing the rent payable by him. These considerations do not apply to cases where one of the co-sharers sues to eject a trespasser; he will then be acting on behalf of his co-sharers. This view is supported by the decision in *Ram Buksh* v. *Chanda* [5] In *Mangalasami Thevar* v. *Satayappa Poranden*[6] one of the co-sharers was allowed to sue for his share of the rent upon a joint contract. These decisions show that in Madras and in Allahabad the view taken in *Gopal Ram Mohuri* v. *Dhakeshwar Pershad Narain Singh* [7] does not find any support; I have stated already that on principle there is no justification for the theory that one co-sharer alone cannot maintain a suit to recover property from a trespasser. The ground therefore upon which the courts below dismissed the suit cannot be sustained.

Mr. Ananthakrishna Aiyar for the Respondent has drawn our attention to a decision of *Benson and Sundara Aiyar JJ. in Chellasami Tevar* v. *Alayan* S.A. No. 1957 of 1911 which holds that when a co-sharer purchases the tenant's interest the suit brought by the other co-sharers should be dismissed. The question whether joint possession can be given to the plaintiff co-sharers with the defendant co-sharers was not considered in that case. S. 8 clause 2 of the

1. (1908) I. L. R. 35. C. 807
2. (1905) I. L. R. 29 Mad. 29.
3. (1913) 25 M. L. J. 315.
4. (1910) I. L. R. 38 C. 270.
5. (1911) 8 A. L. J. 272.
6. (1913) 25 M. L. J. 351.
7. (1908) I. L. R. 35 C. 807.

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Seshagiri Aiyar J.

Estates Land Act provides that when a landlord obtains by transfer of the occupancy right in the land he shall be entitled to holding the land subject to the payment to his co-landholders the share of the rent which may from time to time be payable to them. The principle of this section as contended for by Mr. Srinivasa Aiyangar for the appellant is to keep alive the liability to pay rent as tenant even after the purchase; in other words, the purchase does not work out a fusion of the interest of the landlord and the tenant. When we compare clause 1 of S. 8 which provides for the merger of the interests of landlord and tenant it is clear that the legislature intended that only in cases where the entire interests of the landlord and tenant co-alesce that the distinct capacities of the tenant and landlord should cease to exist. The language of S. 111, clause (d) of the Transfer of Property Act is to the same effect. Reference may also be made to S. 60 of the Transfer of Property Act which enables a co-mortgagor to sue to redeem his share only under certain conditions. I therefore hold that the 2nd defendant has not ceased to be a tenant by purchasing the interests of the 1st defendant in a portion of the holding. Even in this view I am not prepared to agree with Mr. Srinivasa Aiyangar's contention that the 2nd defendant can be evicted from the property. The plaintiff is only entitled to joint possession with him. Neither the plaintiff nor the 2nd defendant can predicate that they have got rights in any specific portion of the property. Their right is for joint possession until by partition specific portions are allotted to their share. I would have been prepared to give a decree for joint possession to the plaintiff along with the 2nd defendant if such a decree can be passed in this suit. But the proceedings commenced in a Revenue Court; and Mr. Srinivasa Iyengar has shewn us no provision of law nor any authority that the special Deputy Collector is competent to pass a decree for joint possession. I dismiss the second appeal on this ground. But under the circumstances of the case I make no order as to costs.

Lala Brij Lal. v. Mt. Inda Kunwar.

PRIVY COUNCIL.

Present:—Lords Shaw, Moulton and Mr. Ameer Ali.

On Appeal from the High Court at Allahabad.

Lala Brij Lal ... *Appellant.*

v.

Musammat Inda Kunwar and others... *Respondents.*

Hindu Law—Alienation—Widow in possession—Legal necessity—Onus of proving legal necessity—Nature of evidence—Recital in deeds insufficient—Relationship, proof of—discrepancies in oral evidence.

The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser and in the absence of evidence to prove legal necessity such as would bind the estate, the purchaser must fail.

Recitals in mortgages or deeds of sale by widows with regard to the existence of necessity for the alienation are not by themselves evidence of the fact. To substantiate the allegation there must be some evidence *aliunde.*

Where witnesses have to prove only one link in the chain of relationship the discrepancies in their statements on material points should not be lightly passed over.

Appeal from a Judgment and three Decrees of the High Court, two dated Dec. 23, 1909 and the third dated March 8, 1910 which partly affirmed and partly reversed the Judgment and Decrees of the Court of the Subordinate Judge of Bareilly dated Nov. 27 and Dec. 23, 1907.

One Kundan Lal owner of Mouzah Kilchipur had two sons, and Mihin Lal and Sham Lal. Mihin Lal died in 1853 leaving a son Lila Dhar and Sham Lal died in 1859 leaving his widow Nimma behind. On Sham Lal's death the property vested in Lila Dhar Lal. When the latter died in 1861 his widow Rukmin became the owner. Nimma and Rukmin sold 10 biswas share to one Dhal Chand. In 1871 the two widows and Dhal Chand jointly executed a usufructuary mortgage of the whole Mouzah in favour of the appellants ancestor. The plaintiff, Mussammat Inda Kunwar claimed the possession or redemption of 10 biswas of Khilchipur mortgaged to Lala Ram for 12 years by way of usufructuary mortgage by Nimma, Rukmin and Dal Chand. On the death of Dal Chand his widow Bhauna effected or suffered sales in respect of the equity of redemption and died in 1905. Two suits for possession were brought one by the persons claiming to be the reversioners and the other by an assignee from them of a moiety. The contention was whether the tranfers by the three widows, Nimma Rukmin, and Bhauna were without legal necessity and therefore could not bind the reversioners. On behalf of the defendants, it was contended that Kundan Lal had no daughter and that the plaintiff was not the reversionary heir of Mihin Lal and Sham Lal, that the name of

Dal Chand was by mistake entered in the mortgage deed of 1871 and that his wife Bhauna obtained possession of 10 biswas as a mere trespasser. The sale by her was made in discharge of lawful debt. Nimma and Rukmin also sold the property in dispute to pay off a lawful debt. Both Nimma and Rukmin having died more than 12 years before the institution of the suit, the right of the reversionary heir was barred by limitation.

The Subordinate Judge held that the plaintiffs were the reversionary heir of Dal Chand only and that the mortgage of 1871 was binding on her. He further held that the alienation by Dal Chand's widow was for necessity and gave a decree for the redemption in respect of two biswas only. On appeal to the High Court it was held, that plaintiffs were the reversionary heirs of Lila Dhar that neither the alienation to Dal Chand nor the mortgage of 1871 was for legal necessity and also that the suit for recovery of the property in question was not barred by limitation. The plaintiffs were given a decree for the whole of the 20 biswas. The defendants then appealed to the Privy Council.

Sir E. Richards K.C. with him *Dube* for the appellant argued that the plaintiffs had not proved that they were the descendants of Kundan Lal's daughter. All the documents which related to family transactions by way of sale and mortgages were silent upon the point. The sales and mortgages were for legal necessity as was evident from the deeds themselves. They were admissible under section 32 of the Indian Evidence Act. The documents might be sent for to see how the things were. Both Nimma and Rukmin must be presumed to have died more than 12 years ago and therefore the suit was barred by limitation.

[*Ameer Ali*:—The whole thing turns upon the point whether there was legal necessity or not.]

Reference was made to Secs. 32 and 108 of the Indian Evidence Act, to Art. 140, 142, Schedule II of the Indian Limitation Act of 1877.

De Gruyther K. C. with him *Parikh* for the Respondent contended that there were documents which the Subordinate Judge ought not to have used.

[*Lord Moulton* :—The documents came from proper custody: you must then shew that you objected to their being admitted.]

[*Mr. Ameer Ali*:—A suit by a reversioner to redeem a mortgage 12 years after the death of the widow is not maintainable.]

That was not the point as a suit would be brought as long as there was a survivor. The sale by a Hindu widow was invalid

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unless shown to have been actuated by necessity as understood in the Hindu Law. Mere borrowing money was no proof that necessity existed.

Reference was made to *Maheshwar Bakhsh Singh* v. *Ratan Singh* [1], *Deputy Commissioner* of *Kheri* v. *Khanjan Singh* [2].

Sir E. Richards replied and referred to *Mussamat Lal Koer* v. *Chiranji Lal* [3].

The Judgment of their Lordships was delivered by

Mr. Ameer Ali :—The suits which have given rise to this consolidated appeal from three decrees of the High Court of Allahabad relate to a property called Mouzah Khilchipur lying in the district of Rae Bareilly in the United Provinces of India.

The mouzah is now in the possession of the Defendant-Appellant under a usufructuary mortgage executed in 1871 in favour of his ancestor Madhoram by two Hindu ladies, Rukmin and Nimma, and one Dhal Chand. Other titles were created subsequently in favour of Madhoram or his son Darbari Lal to some of which reference will be made in the course of this judgment. But the Plaintiffs' claim to possession depends principally on their right to redeem the mortgage of 1871.

Mouzah Khilchipur belonged originally to one Kundan Lal; he died many years ago, leaving two sons Mihin Lal and Sham Lal who it is not disputed were joint in food and estate. Mihin Lal died in 1853, and Sham Lal in 1859, leaving his widow Nimma and a nephew named Lila Dhar, Mihin Lal's son. On Sham Lal's death the whole property devolved on Lila Dhar. Lila Dhar died in 1861 when Rukmin, his widow, became the owner taking a widow's estate under Hindu Law. But although Rukmin as the widow of the last full owner was entitled to the entire property, it would appear that Sham Lal's widow claimed, or was acknowledged, to possess an equal interest with Rukmin. In 1862 the two widows jointly sold a half or 10 biswas share of the village to Dhal Chand who is said to have been Rukmin's manager. In 1871, the three, Dhal Chand, Rukmin, and Nimma executed the usufructuary mortgage referred to above for a period of 12 years in respect of the entire mouzah represented as 20 biswas in favour of Madhoram, the conditions being

1. (1896) L. R. 23 I. A. 57. 2. (1906) L. R. 34 I. A. 72.
3. (1909) L. R. 37 I. A. 1.

that at the end of the term the debt would become satisfied and the mortgagors would recover the property without payment of the "principal mortgage money" or interest. Dhal Chand died, it is said, in 1873 and in 1874 his widow, Bhauna, sold the equity of redemption in respect of eight biswas out of the 10 biswas he had acquired from Rukmin and Nimma to the son of Madhoram, Durbari Lall, and his widow, Chando, one of the Defendants in the present suits. The equity of redemption in respect of the remaining two biswas was sold in execution of a decree against Bhauna, and passed ultimately into the hands of the Appellant.

It is unnecessary for the determination of this Appeal to refer to the subsequent transactions by which Madhoram's son acquired the equity of redemption in respect of the 10 biswas that had remained in the hands of Rukmin and Nimma after the sale of the moiety to Dhal Chand.

The Brahman Plaintiffs claim to be the reversioners of both Lila Dhar and Dhal Chand. They allege that Bhauna, Dhal Chand's widow, died in 1905, Nimma in 1906, and Rukmin a few years ago, and that upon their respective deaths whatever rights they had purported to create in favour of Madhoram came to an end, and they are entitled to possession of the entire property. They have transferred a moiety of the mouzah with all the appurtenant rights to Inda Koer, who brings one suit in respect of the share purchased by her, whilst the Brahman Plaintiffs have sued separately for the other share claimed by them.

With regard to the 10 biswas Dhal Chand had purchased from Rukmin and Nimma, they allege that the sale of the equity of redemption in respect of eight biswas by Bhauna was without legal necessity and that the execution sale of the two biswas was in respect of a personal decree against her, and that, consequently, neither transaction is binding against them.

The contesting Defendants, the representatives of Madhoram, denied that the Brahman Plaintiffs were the reversioners of either Lila Dhar or Dhal Chand; that their claim was barred by the Statute of Limitations, as Rukmin, the widow of the last full owner, died more than 12 years before suit, and that even if the Brahman Plaintiffs were the reversioners of Lila Dhar or Dhal Chand, the transactions impugned by them were for legal

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necessity and consequently binding against them. The two suits were tried together, and although in consequence of the decree of the Subordinate Judge there were three separate Appeals to the High Court, they were heard together; and subsequently on an application for leave to appeal to His Majesty in Council, all three Appeals were consolidated. The case has thus come before their Lordships as a single consolidated Appeal. Their Lordships propose, therefore, in order to avoid confusion, to deal with the two suits as one consolidated action from the outset. The Trial Judge was of opinion that the evidence produced to establish the relationship of the Brahman Plaintiffs to Lila Dhar was wholly untrustworthy. He, therefore, did not consider it necessary to enter upon an enquiry as to the time of Rukmin's death,

He held, however, that the Brahman Plaintiffs (save Lachman) were the reversioners of Dhal Chand, being his brother's sons; that the sale of the equity of redemption by Bhauna in respect of eight biswas was for legal necessity, but that there was no proof that the sale by auction of the two biswas in execution of the decree against her was "in satisfaction of a debt contracted by her for legal necessity." He accordingly made a decree in Inda Koer's suit for the redemption of the mortgage of 1871 in respect of two biswas, and dismissed the rest of her claim as well as the claim of the Brahman Plaintiffs in their suit.

From these decrees there were, as already observed, three Appeals to the High Court; one by the Defendants in respect of the two biswas, and the two others by the two sets of Plaintiffs, namely, Inda and the Brahmans respectively.

As regards the relationship of the Brahman Plaintiffs to Lila Dhar, the learned Judges of the High Court have come to a diametrically opposite conclusion to the Trial Judge. They hold that it is satisfactorily established they are the descendents of one Bhauna, alias Mulo, a daughter of Kundan Lal, and therefore related as *Bandhus* to Lila Dhar, Rukmin's husband. They have further held that the sale by Rukmin and Nimma in 1862 to Dhal Chand, the mortgage of 1871 by these three to Madhoram, and the sale of the equity of redemption by Bhauna, Dal Chand's widow, in respect of eight biswas, were without legal necessity. They have also held that Rukmin was alive

within 12 years from date of suit. They accordingly reversed the decree of the Trial Judge by which he had dismissed the plaintiffs' claim in respect of eighteen biswas, and affirming his order in respect of the two biswas, made a decree in favour of the Plaintiffs in both suits.

In the present appeal the defendant Brij Lal, the grandson of Madhoram, challenges all the conclusions of the High Court. The case as presented at their Lordships' Bar is divisible into two parts, one relating to the reversionary right to Dhal Chand's estate, the other to Lila Dhar's. It is not disputed now that the Brahman Plaintiffs, including Lachman, are the sons of Dhal Chand's brothers, and are, therefore, entitled to his estate on the death in 1905 of his widow Bhauna. The only question for determination on this part of the case is whether the sale by Bhauna of the equity of redemption in respect of the eight biswas was for legal necessity. The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the Appellant has adduced no evidence to prove legal necessity as would bind the husband's estate. He has relied simply on the recitals in the schedule attached to the sale deed. Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*.

In these circumstances their Lordships are of opinion that the conclusion of the High Court with regard to the sale by Bhauna of the equity of redemption in respect of the eight biswas is well founded.

Respecting the other two biswas which belonged to Dhal Chand, there is a concurrent finding of fact by the two Courts that the decretal debt in execution of which it was sold was not for legal necessity. In the result, therefore, as regards the share purchased by Dhal Chand from Rukmin and Nimma in 1862, and which he jointly with them mortgaged in 1871 to Madhoram, the Brahman Plaintiffs as reversioners of Dhal Chand, are entitled to the same.

The position respecting the other 10 biswas seems to their Lordships quite different. The right of the Plaintiffs to that

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share rests on the allegations that they are the grandsons of one Bhaûna *alias* Mulo, who was a daughter of Kundan Lal and the sister of Sham Lal and Mihin Lal. There is no documentary evidence in support of the statement that the wife of Hulas Rai, the grandfather of the Plaintiffs, was a daughter of Kundan Lal. It was natural to expect that in 1862, when Rukmin and Nimma sold a moiety of the property to Dhal Chand, the uncle of the Plaintiffs, on which occasion the relationship of Lila Dhur, Rukmin's husband, was stated, with some particularity, a reference should be made to the vendee's connection with the family. Other documents of a similar nature are equally silent. As observed already, the Plaintiffs' allegation rests entirely on oral testimony. Having regard to the divergence of opinion between the two Courts in India with respect to the credibility of the Plaintiff's witnesses, their Lordships have closely examined the evidence, and they cannot help considering it to be of a very dubious character. The witnesses had to prove only one link in the chain of relationship; the discrepancies, therefore, in their statements on material points, which have been somewhat lightly passed over by the High Court, seriously affect, in their Lordships' opinion, the value of their testimony. Their Lordships agree with the Trial Judge in considering the evidence as to Mulo being a sister of Sham Lal and Mihin Lal as worthless. In this view of the case, it is hardly necessary to determine whether Rukmin was alive or not within twelve years from date of suit. Admittedly she left her home many years ago. The Plaintiffs allege she went on a pilgrimage, and was last heard of eight or nine years before the action. The defendant, on the other hand, says she had to leave her home a considerable time before owing to having been outcasted for unchastity. Most of the witnesses who speak to her being recently alive state they obtained their information from Het Ram, one of the Plaintiffs, who has not thought fit to enter the witness-box. On the other hand, there are some corroborative circumstances which incline their Lordships to believe that Rukmin left the village in consequence of her lapse, and died many years ago in a distant relative's home.

On the whole it appears to their Lordships that the Plaintiffs have failed to establish their right to recover possession of the remaining 10 biswas, as reversioners to Rukmin's husband. The decree of the High ourt in the suit of Inda Koer omits,

however, from consideration the covenant in the deed of mortgage which provides that at the time of redemption the mortgagors:— Lala Brij Lal v. Mt. Inda Kanwar.

"Shall be liable for the amount of arrears and the amount of *takavi* advances "and the amount advanced on account of seed which may be due to the mortgagee "by the tenants of the village according to the entries in the *patwari's* papers".

Their Lordships are of opinion that the decrees of the Courts in India should be discharged, that the claim of the Brahman Plaintiffs in their suit should be dismissed, and in the suit of Inda Koer who has acquired the 10 biswas which alone the Brahman Plaintiffs had a right to sell, there should be a declaration that she is entitled to recover possession of the same from the Defendant-Appellant, with mesne profits as provided by law, less any sum that may be found due to the mortgagee defendant upon the taking of proper accounts on the basis of the above-recited covenant within a time to be specified by the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Considering the result, they think the ends of justice will be served by making the parties bear their respective costs in the Appeals to the High Court and to this Board.

Solicitors for Appellant: Barrow, Rogers and Neville.

Solicitor for Respondents: Edward Dalgado.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Spencer.

Krishnappa Chetty *Appellant* (3rd Defendant)*

v.

Abdul Khader Saheb, and others. *Respondents.*

(Plaintiff, the 2nd Defendant and the legal representatives of the deceased 1st defendant.

Transfer of Property Act, S. 52—Lis Pendens—C. P. C., O. 21, R. 63—Suit under—Only continuation of claim proceeding—Purchaser after order—Alienee pendente lite—Not necessary party to suit—Limitation Act, S. 22—Addition of after limitation time—Suit not barred, if suit against claimant in time Krishnappa Chetty v. Abdul Khader Saheb.

*S. A. No. 276 of 1910 17th October 1918.

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Suits under O. 21, R. 63 being only a continuation of the claim proceedings, a purchaser from the claimant after the date of the order and before suit must be deemed an alienee *pendente lite* like a purchasor after decree and before appeal, who takes his alienation subject to the result of the suit against the claimant, under S. 52 of the Transfer of Property Act.

S. 22 of the Limitation Act has no application where the party added is not a necessary party.

Where a suit was instituted against the claimant in time but when the purchaser brought himself on record, more than a year had elapsed from the date of the order.

Held that as he was only an alienee *pendente lite* he was not a necessary party and the suit was in time.

Second Appeal against the decree of the District Court of Salem in Appeal Suit No. 197 of 1905 preferred against the decree of the Court of the District Munsiff of Tirupattur in Original Suit No. 927 of 1903.

K. R. Subramanya Sastri for Appellant.

T. V. Muthukrishna Iyer for Respondents.

The Court delivered the following

Judgment :—*Sadasiva Aiyar, J* :—The third defendant is the appellant before us. When the plaintiff attached plaint properties in execution of the decree which he had obtained in O. S. No. 20 of 1897 on the file of the District Court of Salem as the properties of his judgment-debtor (the present 2nd defendant), the present 1st defendant put in a claim as the owner of the properties. His claim was allowed and the properties were released on the 18th December 1902. The present suit was brought on the 21st October 1903 (within the one year allowed by law) by the plaintiff to establish his right to attach the plaint properties as the property of his judgment-debtor, the present 2nd defendant. The 3rd defendant, the appellant before us, purchased the plaint properties from the claimant (namely, the 1st defendant) on the 29th December 1902, that is 11 days after the order on the claim petition in the 1st defendant's favour. He however, never took actual possession of the lands and merely got a rent deed, Exhibit B, on the very same date from the 1st defendant. The plaintiff, who evidently did not know of this sale deed to the 3rd defendant by the 1st defendant brought this suit making defendants Nos. 1 and 2 alone parties to the suit ; and when he brought the suit, the one year's period of limitation (as I said before) had not expired. The 3rd defendant applied to be brought on the record as supplemental defendant and he was made supplemental defendant on the 20th March 1904. On

the date when he was so made as supplemental defendant, more than a year had elapsed from the date of the order on the claim petition in the 1st defendant's favour. Both the lower Courts found all the facts in the plaintiff's favour and decreed the plaintiff's suit. Hence this second appeal by the 3rd defendant. There are 16 grounds alleged in the memorandum of second appeal. Except the contention as to limitation which I shall presently consider, the other contentions are clearly unsustainable; one contention not put forward in the lower Courts was argued before us. That was based on the following facts. One Narasinga Row claimed a charge on the plaint properties on the basis of some transactions between himself and the 1st defendant. That claim he put forward when the properties were attached by the plaintiff. His claim was allowed in December 1902. The 3rd defendant, out of the purchase money due by him to the 1st defendant, paid Rs. 400 to Narasinga Row. The 3rd defendant's contention based on these facts is that he is entitled to stand in the shoes of Narasinga Row and, as the plaintiff has not set aside the claim order in favour of Narasinga Row by a suit against Narasinga Row within one year of the date of that order, the defendant is at least entitled to a charge to the extent of Rs. 400 on the plaint lands. I think that this fresh contention cannot be allowed to be raised in second appeal especially as the order, Exhibit A, in Narasinga Row's favour does not state what was the exact nature of the claim which was put forward by Narasinga Row, that is, whether the claim he put forward was to a charge of Rs. 400 on these plaint properties. Fresh evidence would be required namely a copy of the claim petition filed by Narasinga Row before we could safely find that the order, Exhibit A, gave him a charge to the extent of Rs. 400. Such fresh evidence should not ordinarily be allowed to be adduced in second appeal by a litigant who failed to raise in the lower Courts the contention in support of which the fresh evidence is required. As I said, the only contention which requires serious consideration is the contention as to limitation. This contention may be formulated thus.

(*a*) The plaintiff's cause of action to bring the suit is the order passed in the 1st defendant's favor in December 1902. The cause of action was, no doubt, *on that date* to be prosecuted against the 1st defendant as *he* claimed then to be the owner of the property and the claim order was passed in *his* favour in

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respect of the property which the plaintiff attached in execution of the plaintiff's decree.

(b) When the 3rd defendant afterwards purchased the property, the cause of action became directed and prosecutable against the alienee (the 3rd defendant) and any suit brought by the plaintiff to set aside the order on the claim petition should be directed against the 3rd defendant who had become a necessary party defendant to such a suit. The 1st defendant's interest in contesting the plaintiff's alleged right to attach the properties as the properties of his judgment-debtor ceased with the 1st defendant's alienation of the properties to the 3rd defendant, and hence the 1st defendant was no longer the proper party to be impleaded in the suit which the plaintiff had to bring under O. 21, R. 63. corresponding to the old section 283 of the Civil Procedure Code. As the necessary party (the 3rd defendant) was not brought on record till March 1904, that is, till after the expiry of the one year's period, the present suit is barred by limitation as against the 3rd defendant who now represents the right in the lands, the validity of which rights was established as against the plaintiff by the order on the claim petition.

Mr. T. V. Muthukrishna Aiyar who appeared for the plaintiff respondent, advanced in a very able manner three sets of arguments in reply to the appellant's above contentions. One argument was founded on the consideration that the suit brought under O. 21, R. 63 is of such a peculiar nature that it can be brought only against the successful claimant in the claim petition, and that the successful claimant's alienees ought not to be made defendants as the cause of action vested in the unsuccessful decree-holder against the successful claimant personally. I am, however, unable to accept this argument. The order on the claim petition is connected with rights in immovable property (the decree-holder claiming a right to attach it and the claimant putting forward a right in himself in the property which entitles him to have it released). Hence the suit is not concerned merely with personal liabilities. Coming next to the second argument of Mr. T. V. Muthukristna Aiyar, if I understood him aright, his contention might be stated thus:—Though by the order on the claim petition, the attached property was released in favour of the claimant, it was not a *final* release. The effect

1. (1883) L. R. 10 I. A. 188.

of the release might be nullified if the decree-holder's suit brought within one year after the release order was successful. Hence as regards the validity of alienation between the date of the claim petition order and the date of the suit brought to set aside that order, the attachment must be deemed to be subsisting. If the attachment is in essence subsisting, S. 64 of the Civil Procedure Code, (old S. 276,) enacts that alienations of property under a subsisting attachment shall be void as against all claims enforceable under the attachment. The alienation to the 3rd defendant by the 1st defendant is therefore void. The 3rd defendant is therefore not a necessary party.

I think that this argument also cannot be accepted, as S. 64 clearly contemplates alienations by the judgment-debtor and not by a successful claimant as pointed out by the appellant's learned vakil, Mr. K. R. Subramanya Sastriar. Mr. Muthukristna Aiyar quoted before us passages from several decisions passed by the High Courts to support the above two contentions, viz., that the suit brought under section 283 is a sort of personal suit and (2) that the release of the attached property in favor of a claimant is not a final release. I do not think it necessary to refer to the decisions in detail. The second contention is, though correct, irrelevant to this case. As regards the first contention, loose general expressions found in Judgments ought to be read in the light of the facts and circumstances of the particular cases in which the decisions were given and, so reading the passages relied upon, I cannot hold that they support the contention that the order on a claim petition is merely an affair between the parties in their personal capacities unconnected with rights to or over property.

The third argument of Mr. T. V. Muthukristna Aiyar might be thus stated:—The suit brought under O. 21, R. 63 is a mere continuation of the proceedings in the claim petition. As such, all alienations during the continuance of the proceedings originated by the claim petition till the disposal of the suit brought to set aside the claim petition order are alienations *pendente lite* and are affected by the doctrine of *lis pendens* formulated in S. 52 of the Transfer of Property Act. If so, the alienation to the 3rd defendant by the 1st defendant was an *alienation pendente lite* and the 3rd defendant as such alienee

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was not a necessary party to the suit. He might be made a party defendant as an act of grace by the Court in order that he might be allowed to protect his interest; but as he is not a *necessary* party, he cannot raise the question of limitation based on the fact that he was made a party after the period of limitation had expired; in other words, he cannot take advantage of the provision contained in S. 22 clause (1) of the Limitation Act. If, through the doctrine of *lis pendens*, a decree passed against the 1st defendant will be binding upon the 3rd defendant, the 3rd defendant is of course not a necessary party.

I think that this contention is a sound one. I am free to confess that it was only after a good deal of hesitation and consideration that I was able to come to the conclusion as to the soundness of this argument. In *K. I. Narainan* v. *K. I. Nilakandan Nambudri* [1] *Turner C. J. and Muthusamy Aiyar J.* made the following observations. "The Code of Civil Procedure contains no provisions enabling a Court other than a Court, of Appeal or a High Court acting under Section 622, to discharge an order of attachment issued by another Court. Where a person deems himself aggrieved by the issue of an order of attachment he should apply to the Court which issued the order to recall it; if he fails to obtain relief because his right is uncertain, he must go to a proper Court to establish that right. The Court to which he would have to resort for the establishment of his right may, as it is in the present case, be the same Court by which the order for attachment was issued; it may be a Court of inferior jurisdiction. It could not have been contemplated that a Munsif should be competent to make an order directing the District Judge to discharge an order made by him for attachment. In fact, no such power is given to one Court over the orders of another. What the law contemplates is that, having established his right to the interest claimed by him in the attached property by declaration of right or otherwise, the person aggrieved should carry his decree to the Court by which the order was issued, which Court would be bound to recognise the adjudication and to govern itself accordingly". "If these observations are still good law, it is difficult to argue that the suit brought under S. 283 is a continuation of the proceedings in the claim petition. Mr. Subramanya Sastry,

1. (1881) I. L. R. 4 M. 131.

though he did not cite *K. I. Narainan* v. *K. I. Nilakandan Nambudri* [1], quoted several subsequent cases in which similar observations occur. I do not think it necessary to deal in detail with them, as they do not carry us further than this early case in *Narainan* v. *Nilakantan Nambudri* [1]. It appears to me however, that the authority of *K. I. Narainan* v. *K. I. Nilakantan Nambudri* [1] and of the subsequent cases quoted by the appellant's learned vakil has been shaken by the ruling of the Privy Council to be referred to presently.

Before considering that ruling of the Privy Council, I shall refer to one case, decided by the Calcutta High Court. In *Bonomali Rai* v. *Prosunno Narain Chowdhry*, [2] the facts were as follows:—One Mazaffer Hussain was a decree-holder against certain defendants who may be called the elder Sircars. He attached certain properties of these elder Sircars. The son of one of these Sircars put in a claim petition, and the attached property was released. Then the decree-holder brought a suit against the judgment-debtors and Durga Charan to establish his right to attach the property in execution of his decree, and he succeeded in that suit. But between the date of the order on the claim petition releasing the property and the date of the suit, Durgacharan (the claimant) mortgaged the land to two other persons who were not made parties to the suit brought under S. 283. The question in the final suit brought by the purchaser at the Court auction sale held after the success of the suit under S. 283 was whether the two mortgagees were bound by the result of the suit brought by the decree-holder against Durgacharan in which the decree-holder's right to attach the properties as the properties of the elder Sircars was established. The Calcutta High Court held that the mortgage by Durgacharan was invalid as against the claims enforceable under the original attachment which, though released by the order on the claim petition, was revived by the decree in the suit brought under section 283. No doubt, that case might be distinguished from the present case on the ground that the mortgage, though nominally by the claimant Durgacharan, was really by the judgment-debtors, the claimant having been found in that case to have been the benamidar of the judgment debtors (the elder Sircars).

1. (1881) I. L. R. 4 M. 131. 2. (1896) I. L. R. 23. Cal. 829.

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Coming to the Privy-Council case, the following observations appear in *Phul Kumari* v. *Ghanshyam Misra*, [1] the judgment in which was delivered by Lord Robertson: "For the right determination of the question at issue" (the question being as to proper Court fees payable on the plaint in a suit brought under section 283 of the Civil Procedure Code) " it is necessary to ascertain what are the object and nature of the suit. Now, fortunately, this is not dubious.................

Now, the 17th Article of Schedule 11 of the Court Fees Act is expressly made to apply to " Plaint or Memorandum of appeal in each of the following suits:" i. " To alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent, or of any Revenue Court." " Now this is an exact description of the effect of the appellant's suit. It is true that, instead of asking the Court to alter or set aside the decrees which is the cause of action she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge, and which the Subordinate Judge had refused. But this is merely a verbal or formal difference and section 283 of the Civil Procedure Code * * * * recognises such a suit as not merely an appropriate but the only mode of obtaining review in such cases."

"Their Lordships are accordingly of opinion that the first head of Article 17 of schedule II, applies to the case. This view is opposed not only to that of the respondents and of the High Court but to that of the appellant. Misled by the form of the action directed by Section 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming the cause of action." Then in another sentence at page 207 their Lordships say that it is a mistake to treat the action brought under Section 283 as an "original action."

I think this decision of their Lordships which is binding upon us is almost conclusive to show that suits of this class though called original suits, are not *in their essence* original actions but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits. Though the Court in which this appellate action might be brought may be sometimes a Court which ordinarily is inferior to the Court by

1. (1907) I L, R. 35 Cal. 202.

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which the summary order was passed and though fresh evidence not adduced during the summary enquiry may be adduced by both sides in that appellate action, the suit is in essence, in the words of their Lordships of the Privy Council "a form of appeal", and hence it is not unrelated to the original claim proceedings and it is therefore, in essence, an appeal. The Legislature has allowed one year to file such an appeal suit which is, as I said just now, a continuation of the claim proceedings the lis based on the right and liabilities forming the cause of action in the claim proceedings pending till the appellate suit is finally disposed of. Though in one sense the cause of action for the appellate suit is the order passed against the plaintiff, the cause of action in another and truer sense is the dispute about attachment which was the cause of action for the claim. The right to file an appeal by a defendant who was unsuccessful in the Court of first instance arises out of the plaintiff's cause of action for the suit, though it also arises out of the decision of the first Court passed to the prejudice of the defendant. The right to bring an appeal is however not usually called a "cause of action" to bring an appeal.

The Privy Council ruling in *Phul Kumari* v. *Ghanshyam Misra*, 1 was followed by Benson, Officiating C. J. and Bakewell, J. in, *Veera Pannadi Karuppa Pannadi*[2]. That the suit under S. 283 is a continuation of the claim proceedings is clear also from the case in *Harishankar Jebhai* v. *Naran Karsan*, 3 which decided that the rights of the parties should be decided in the suit as they stood on the date of the claim petition and that the claimant cannot take advantage of the running of time between the date of the claim petition and the date of the suit. It seems to me that having regard to the observations of their Lordships in *Phul Kumari* v. *Ghanshyam Misra* 1 which practically adopted Mr. Woodroffe's arguments in *Kesheri Mohun Rai* v. *Hursook Dass* 4 the remarks in *K. I. Narainan* v. *K. I. Nilakandan Nambudri*, 5 and other cases to the effect that the suit brought under S. 283 is unconnected with the claim proceedings and is not a suit to set aside the order in those petitions must be held to have been overruled. In the result, I am inclined to uphold this contention of the respondent, namely, that

1. (1907) I. L. R., 35 Cal. 202. 2. (1909) 6 M. L. T. 164.
3. (1898) I.L.R., 18 B. 260. 4. (1886) I. L. R., 12 Cal. 696.
5. (1881) I. L. R., 4 Mad. 131.

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the 3rd defendant must be deemed to be an alienee *pendente lite*; see *Settappa Goundan* v. *Muthia Goundan*[1] and S. A. 187 of 1911 as to the invalidity of such alienations *pendente lite*; and he was therefore not a necessary party to the appellate suit. If he was not a necessary party, and if the necessary parties were brought within a period of one year, it follows that he cannot advance the plea of limitation, as S. 22, clause 2, expressly excluded the operation of clause (1) in such cases.

Mr. Muthukrishna Aiyar argued at first that S. 22 of the Limitation Act does not apply where a party is brought on the record by the Court under S. 32 of the Civil Procedure Code (now Order 1 Rule 10 clause 2), but he did not press the point having regard to the Full Bench decision in *Ram Kinkar Biswas* v. *Akhil Chandra Chaudhuri,*[2] and to the case *Thekkian Rangacharlu* v. *Muthu Karupan Kothan*[3]. I have no doubt that the sweeping provision of S. 22 cl. 1 of the Limitation Act is likely to cause hardships in cases where the plaintiff did not know of an alienation which might have taken place a few days before he brought his suit and when he came to know of it after suit and made the alienee a party, the suit might become barred. The remedy, however, is for the Legislature to give a discretion to the Court to treat the suit as against the added defendants or by the added plantiff as being a suit brought by such plaintiff or against such defendant from the date of the original institution; if the Court is clearly satisfied that the omission to add the plaintiff or the defendant in the beginning was not due to the laches or gross negligence of the plaintiff or plaintiffs originally on record.

In the result the second appeal is dismissed with costs.

Spencer J:—The question is whether with reference to S. 22 of the Limitation Act, which makes the date of adding a new defendant to a suit to be reckoned as the date of institution of the suit so far as that defendant is concerned, this suit is time-barred under article 11 schedule 1 of the Act. It is necessary to mention some of the more important dates. The 1st respondent as plaintiff in O. S. No. 20 of 1897 in the Salem District Court and assignee by purchase of the rights of the original plaintiff obtained a compromise decree on the 27th June 1899 against the present 3rd respondent for certain immoveable property and

1. I. L. R. 31 Mad. 268 2. (1907) I. L. R. 35 Cal. 519.
3. (1913) M. W. N. 134.

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Rs. 7,000 in cash to be paid before the 30th August. In execution of the decree for money he attached certain land, whereupon the 2nd respondent, who has died since this Second Appeal was filed, and the present appellant and another preferred claim under S. 278 of the Civil Procedure Code of 1882. The claims of the 2nd respondent and his alienee were allowed on the 18th December 1902. On the 29th December 1902 the appellant purchased the 1st item of the attached property from the 2nd respondent. This suit was launched by the 1st respondent against the 2nd and the 3rd respondents on the 21st October 1903 for a declaration that the attachment of the suit properties was valid. The appellant was added on 26th March 1904 as a supplemental defendant on his own petition, in which he alleged that he was a necessary party to the suit. Though he was actully a party to the order which the District Judge passed on the 18th December 1902 on the claims under S. 278, it was as petitioner in M. P. No. 547 of 1901 which related to property not now in suit. That claim was dismissed. He comes in now only as a purchaser from the 2nd respondent *pendente lite i.e.*, by virtue of a purchase made between the date of disposal of the claim under S. 278 and the date of institution of a suit which is permitted by S. 283 to be brought in review of the order on the claim. Such actions are as pointed out by the Privy Council in *Phul Kumari* v. *Ginshyam Misra*, [1] simply a form of appeal. The plaint in suits of this description is described in that decision as 'a plaint for review of a summary decision'.

The doctrine of *lis pendens* extends to purchases by third persons during the pendency of an appeal. *Vide Sukhdeo Prasad* v. *Jamna*, [2] which was a case of attachment of immovable property in execution of a simple decree, of a consequent claim under S. 278, of a suit under section 283 which was dismissed and of an appeal which finally settled the parties' contentions. Again the plaint in the present suit, O. S. 027. of 1903, was framed for obtaining a declaration under the Specific Relief Act that the attachment of the suit properties by the plaintiff was valid, and for costs. The Court was competent to pass a declaratory decree to such an effect as between the original parties to the suit. The 3rd defendant was joined

1. (1907) I. L. R. 35 Cal. 202. 2. (1900) I. L. R., 28 All. 60.

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at his own request for the purpose of safeguarding the rights subsisting as between him and others claiming generally in the same interest. He might have remained quiet and awaited proceedings being taken to dispossess him. In *Guruvayya* v. *Dattatraya*, 1 the Bombay High Court held that in such circumstances the determination by application of S. 22 of the Limitation Act of the date of institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the plaintiff to continue the suit and would not therefore attract the application of the general provisions of the Limitation Act. The freshly joined parties in that case were co-plaintiffs, but the same principle must be applied if additional defendants are added under such circumstances, and has been applied in *Ayyam Chetty* v. *Pungavanam* 2 where real owners were added more than one year after a suit was brought against a person against whom an order under S. 335 was passed who claimed to be a mere benamidar. The appeal therefore fails on this point.

The appellant has failed to make out his other pleas. I agree in thinking that this second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.†

Ordinary Original Civil Jurisdiction.

Present:—Mr. Justice Wallis.

T. R. Ganesh Row *alias* Venkat Row ... *Plaintiff* *

v.

T. V. Tulja Ram Row and others ... *Defendants.*

Ganesh Row v. Tulja Ram Row

Hindu Law--Decree for partition--Compromise by father without leave of Court —Satisfaction entered up—Declared not binding against son—Remedy of the son— C. P. C., S. 244 (N. C. 47)—Conversion of plaint into application—Compromise binding to the extent of the share of father as at the date of compromise—Status of the family, joint—Subsequently born sons entitled to participate in the order.

Where in a suit for partition, plaintiff's father got a decree representing his branch then consisting of himself and of his minor son, the plaintiff who was also a party to the suit, and subsequently entered into a compromise by which he entered up satisfaction of the decree, which was held by the Privy Council not to be binding against the son the compromise being without leave of the court.

[† The case now came on for hearing pursuant to the order of the Privy Council returning the case to the High Court for the trial of the questions covered by issues 6 and 7 (*vide* 25 M. L. J. 150). The facts of the case will be found fully set out in the judgment of *Wallis J.* reported in 19 M. L. J. 4.]

1. (1908) I.L. R. 28 Bom. 11.
2. (1908) 18 M. L. J. p. 464.

* O. S. 194 of 06. 18th December, 1913.

Held, that the proper remedy of the plaintiff was to move by application under S. 244 (S. 47 N C.) to reopen the satisfaction entered up and on such application the court could grant him all the appropriate reliefs.

The plaint was accordingly converted into an application under S. 244 C. P. C. and disposed of on that footing.

Held also, that the compromise was binding to the extent of the father's share which was to be calculated as it stood at the date of the compromise *viz.* one half.

Held, nevertheless, that the family continued joint even in respect of the subject matter of the compromise and the subsequently born sons were entitled to participate in the remaining half.

T. R. Venkatrama Sastri for Plaintiff.

V. Masilamani Pillai and *T. V. Muthukrishna Aiyar*, for Defendants.

The Court delivered the following :—

Judgment :—In this case the Privy Council have given the plaintiff a declaration that the compromise entered into by his father in C. S. No. 266 of 1886 was not binding on him for want of sanction under S. 462 C. P. C. and that he ought to be remitted to his original rights under that decree. They have also remitted the suit under appeal 194 of 1906 to this Court in order, in the words of the Orders in Council, ' that the other questions arising between the parties and covered by the issues Nos. 6 and 7 may be disposed of.' The 6th issue is " Is the plaintiff in any event entitled to recover more than a moiety of the amount sued for?" It is not seriously contended that the compromise entered into by the plaintiff's father did not bind his own share in the property of the joint family which consisted at the time of the plaintiff and his father, or that the compromise must not in this suit be considered an alienation made by the father for consideration. It is consequently binding on the father's share. The fact that since the institution of C. S. No. 194 of 1906 two sons have been born to the plaintiff's father cannot under the recent Full Bench decision in *Chinnu Pillai* v. *Kalimuthu Chetti* [1] have the effect of diminishing the alienation made by the compromise in favor of the 1st Defendant, and the issue therefore be answered in the negative.

The 7th issue is "Is the plaintiff entitled to charge interest and if so at what rate ? The rate of interest given by final decree in O. S. No. 266 of 1886 is six per cent. At the date of the final decree there was an appeal pending against the interim decree and the final decree was made subject to the result of the appeal. On the appeal which was heard shortly before the compromise an additional amount was made payable to the

1. (1911) I. L. R. 35 M. 47, S. C. 21 M. L. J. 246.

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plaintiff's father as representing his branch of the family. In the ordinary course the final decree would have been amended as provided therein and the additional sums would have been made payable with the same rate of interest and from the same date. As it was, the plaintiff's father entered up satisfaction pursuant to the compromise which has now been declared to be not binding under the decree. Their Lordships have declared the plaintiff to be entitled to be remitted to his original rights under that decree, and they include in my opinion a right to receive interest at 6 p. c. not only one half the sum mentioned in the final decree but also half the additional sum which was found payable on appeal against the interim decree. This disposes of the second issue.

These are the only issues remitted by their Lordships but some further questions have been raised on behalf of the 1st defendant. In the first place it is contended that as this court decided at the hearing an objection taken by the 1st defendant that the plaintiff ought not to have instituted a separate suit but to have proceeded under S. 244, C. P. C. in the original suit 266 of 1886 and decided to treat this suit as an application under that section, and as under the decree in O.S. 266 of 1886 no relief is awarded to the 6th defendant the present plaintiff, the plaintiff is not entitled to recover anything in this proceeding but must be referred to another suit. There are several answers to this objection. In the first place it appears from a perusal of their Lordship's reason and of the Orders in Council that this Court is required to dispose of the case finally in obedience to the order. Their Lordships were clearly of opinion that this court was right in disposing of the case on the merits and were not called upon to consider whether the present proceedings might be described more correctly as a suit or as an application under S. 244 C.P.C. Secondly the 1st Defendant who persuaded the court at the hearing that the plaintiff's remedy was under S. 244 can scarcely be bound now to say that no remedy is available to him under that section. Lastly I hold that on the merits there is no foundation for the objection. S. 244 requires that questions of the nature specified in the section arising between the parties to the suit shall be determined by the court executing the decree, and not by a separate suit. The word "determined" shows that these questions are to be finally disposed of, and the effect of the section is to give the court executing the decree jurisdiction to

dispose finally of such questions by granting appropriate relief. In C. S. 266 of 1886 certain monies were made payable to the 3rd Defendant as representing his branch of the family which then consisted of himself and the minor 6th Defendant the present plaintiff. The 3rd Defendant having alienated his own share and effected to release the plaintiff's share of such monies in favour of the judgment-debtor it seems to me that it is open to the Court under S. 244 to declare the release not binding on the 6th Defendant the present plaintiff and to make his share payable to him directly by the judgment-debtor.

The 1st Defendant then raises another objection based on the fact which was not before their Lordships that subsequent to the institution of O. S. No. 194 of 1906 two more sons have been born to the plaintiff's father and are it is suggested entitled to equal shares in the fund with their brother the present plaintiff. As they have not been made parties to the suit and as the plaintiff has no title to represent them, it is contended that the utmost he can recover is one-third of one-half or one-sixth of the whole fund in dispute. For the plaintiff on the other hand it is contended that the effect of the release by his father of his own share in the fund was that the residue ceased to be joint family property and became the separate property of the plaintiff in which sons subsequently born to his father acquired no right by birth. *Chinna Sanyasi* v. *Suriya* [1], *Aiyyagiri Venkatramayya* v. *Aiyyagiri Ramayya* [2], *Kadegan* v. *Periya Munisami* [3], *Iburamsa Rowthan* v. *Thiruvenkatasami Naiker* [4], *Chinnu Pillai* v. *Kalimuthu Chetty* [5], *Srinivasa Sundara Thatha Chariar* v. *Krishnasami Aiyangar* [6], were cited in support of this proposition as to which see also *Shivaji Row* v. *Vasanta Row* [7]. On the other hand it was argued that this contention was opposed to the settled practice of the Courts in partition suits in which it is sought to declare that alienations made by some of the coparceners are not binding on the others.

I cannot give judgment for the Plaintiff for the whole half share without deciding this question in his favor, and I think I ought not to decide it in the absence of the Plaintiff's minor

1. (1882) I. L. R. 5 M. 196 2. (1902) I. L. R. 25 M. 690 S.C. 12 M L. J.
3. (1903) 13 M. L. J. 477. 4. (1910) I.L.R. 34 M. 269 S C. 20 M L.J. 748.
5. (1911) I. L. R., 35 M. 47 S. C. 21 M. L. J. 246.
6. (1912) 11 M. L. T., 812. 7. (1903) I. L. R. 33 B. 267.

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brothers who it is suggested are interested in the fund. I accordingly direct the Plaintiff's brothers Ramachandra Row and Krishna Row minors to be made parties defendants with liberty to come in and prefer a claim to share in the fund.

Adjourned to 7th January 1914.

[The plaintiff's brothers were made parties and the Court delivered the following Judgment on the 24th March 1914. Ed.]

I have considered the cases referred to in the argument and also the recent decisions of *Sankaran Nair* and *Bakewell JJ.* in *Nanjaya Mudali* v. *Shanmuga Mudali* [1]. The question for decision is, where a father and son constitute a joint family, and the father alienates to a third party his share in a certain portion of the joint family property, and subsequently to the alienation but before partition of the joint family property another son is born to the father, is such son entitled by birth to share to any and what extent with his brother in the unalienated moiety which did not pass to the alienee by virtue of the alienation, or is the elder son entitled to the whole of the unalienated moiety to the exclusion of his younger brother. The question is one of considerable difficulty and does not appear to have arisen directly for decision. In *Hardi Narain Sahu* v. *Ruder Perkash Misser* [2] however the facts were very like those of the present case. A creditor of the father acquired his share by purchase at a Court auction and obtained possession of the joint family property. The father then purported to convey his share to his son the remaining co-parcener, and the latter sued to recover possession from the auction purchaser on the ground that at utmost he had acquired the father's share, and that as he had not enforced his rights by partition he was not entitled to possession of any of the property. The High Court held that the defendant had only acquired the father's share, and that though he ought strictly to have brought a suit for partition, this proceeding might be treated as such a suit and partition effected. They accordingly joined the plaintiff's mother who under the law then prevailing was entitled to a share. In their judgment they say that another son had been born since the institution of the suit, and that it was contended, apparently by the appellant his elder brother with a view of reducing the share of the defendant the

1. (1913) 15 M. L. T. 186. 2. (1888) I. L. R. 10 C. 626.

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alienee, that the subsequently born son was entitled to a share against the alienee. This they negative holding that the alienee was entitled to the share he would have had if partition had taken place at the date of the alienation, and allotting the other two shares to the minor plaintiff and his mother. The new born son was not a party and the court apparently thought he was not entitled to a share or they would have brought him on the record. The point therefore cannot be said to have been decided.

When the case was under appeal to the Privy Council the mother died and her two surviving sons were brought on as legal representatives. As the younger of them is described in the judgment of the Privy Council as the second son, he must be the son who was born while the appeal to the High Court was pending, and the statement in the body of the report that this son was born while the appeal to the Privy Council was pending must be a slip. No question appears to have been raised before their Lordships as to his claim if any to share in the unalienated portion of the joint family property, and the decision of their Lordships does not seem to touch the point.

The result of the case would appear to be that the High Court did not consider the after born son of the co-parcener who had alienated his share entitled to share with the remaining members as if they had considered him so entitled, they would have protected his interest in passing the decree. In that case he was not a party and the other co-parceners were asserting his right to share so that the case does not seem to be of much authority on this point. All that it decided was that the alienee was entitled to the share which the alienor would have got if there had been a partition at the time of the alienation, a point since expressly settled by this court in *Chinna Pillai* v. *Kalimuthu Chetti* [1]. *Krishnaswami Aiyar J* in the judgment which he prepared but did not deliver in this case, held on the analogy of a rule of English law as to joint-tenancy that an alienation by one of the co-parceners of a portion of the joint family property puts an end to the joint tenancy and converts the co-parceners into tenants in common. And *Benson and Miller JJ.* in *Srinivasa Thatha Chariar* v. *Krishnaswami Aiyangar* [2] subsequently held

1. (1911) I. L. R 35 M. 47, S. C. 21 M. L. J. 246.
2. (1912) 11 M. L. T. 312.

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that where a co-parcener parts with his share in a portion of the joint family property the effect is to put an end to the joint tenancy altogether as to this particular property and make the other co-parceners tenants in common as between themselves along with the alienee. In *Subba Rao* v. *Anantha Narayana Aiyar* [1] Benson and Sundara Aiyar JJ. held that the effect is to make the alienee a tenant in common with the other co-parceners in respect of his property but to leave the other co-parceners joint tenants as between themselves. In the latest case of all *Nanjaya Mudali* v. *Shunmuga Mudali* [2] *Sankaran Nair* and *Bakewell JJ.* dissented from these decisions based on the judgment of *Krishnaswami Aiyar J.* and held that, where a co-parcener alienates his share in a specific portion of the joint family property, the alienee does not become a tenant-in-common of the alienated property, but is only entitled to an equity to stand in the shoes of the alienor, and at partition to have the share allotted to him which he would have had if partition had taken place at the time of alienation and further have a portion of the specific property alienated alloted to him if it can be done without inconvenience. In view of the latest decision, which I ought, I think, to follow, no arguments can be based upon the existence of a supposed tenancy in common after alienation and before partition. How then does the case stand on the footing that the alienee only acquires an equity of the nature indicated above? The son born to the alienor after the alienation but before partition succeeds by birth to a share in the joint family property, and the shares of the other members of his branch are reduced proportionately to make up his share. In the present case the joint family before the birth consisted of the father and elder son. On the birth of the second son to give him his one third share the share of his father and brother would each be reduced by one-third, and he would get from each a one sixth share of the whole to make up his one-third share. The fact of the father having alienated his share appears to me to be no reason why the elder brother's share should not be diminished by a 1/6 share of the whole, as it would have been if no alienation had taken place.

But in order to give the new born son a share equal to his brother, it would be necessary to reduce the elder brother's share

1. (1912) 23 M. L. J. 64. 2. (1913) 15 M. L. T. 186.

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by an additional 1/6 of the whole, as according to the decision the father's share in the hands of the alienee is not liable to any diminution for this purpose. If we allow the elder brother's share to be further reduced in this way, he is prejudiced as a result of the father's alienation. If we refuse to do so the new born son is prevented from participating in what was still joint family property at the time of his birth. The question really comes to this. Is the equity in favour of the alienee of the father's share is to be enforced at the expense of both the other co-parceners the son born before and the son born after alienation or only at the expense of the latter. In theory, something may be said for the second solution but the settled practice of this court, and as far as I can ascertain of mofussil courts also, is the other way. It frequently happens that in partition suits alienees from individual co-parceners are made parties, and the alienations made by individual co-parceners are found not to be binding on the other members of the joint family. In such cases it has never been the practice to make any distinction between sons of the alienor born before the alienation and sons born after alienation but before partition. To do so would add greatly to the complexity of the task of working out a partition. In the absence of direct authority, and in the somewhat conflicting state of the decisions I do not think that, sitting here, I should be justified in departing from what appears to be the settled practice of the Courts more especially as I consider that the existence of such a practice is in a question of this kind a very strong argument against any alteration based on purely theoretical considerations.

There will be a joint decree in favour of the plaintiff and defendants 3 & 4. Plaintiff to recover the costs of the suit from the 1st defendant and to pay the costs of defendants 3 & 4.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar.

P. Ramasami Naidu ... *Petitioner* * *(Defendant)*.

v.

1. Venkataramanjulu Naidu, and others ... *Respondents (Plaintiffs)*.

Ramasami Naidu v. Venkataramanjulu Naidu.

Civil Procedure Code, S. 115—Applicability of, to Presidency Small Cause Courts—Presidency Small Cause Courts Act, S. 41—Condition of jurisdiction to be strictly complied with—Erroneous finding that lease has been determined— Eject-

* C. R. P. No. 864 of 1913. 24th February 1914.

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ment order on that footing—Interference with—Remedy under S. 38, if open—Not bar, when question of jurisdiction involved—Discretion in cases coming under S. 115 cl. (c)—Want of jurisdiction—Interference compulsory—Lease for 18 years & 6 month's notice thereafter—Notice before 15 years—Ineffective.

The Presidency Small Cause Court being a Court subordinate to the High Court, the High Court can interfere under Sec. 115, C. P. C. with an orders passed under Section 41 of the Presidency Small Cause Courts Act.

The jurisdiction conferred by Sec. 41 of the Presidency Small Cause Courts Act being a limited jurisdiction the conditions imposed by the section should be strictly complied with.

Held accordingly where the Small Cause Court erroneously held that a lease had been validly terminated and passed an order in ejectment, that the order was without jurisdiction and could be set aside under S. 115 C. P. C.

The question of the High Court refusing to interfere in its discretion on the ground that the party has another remedy, will generally arise only in cases coming within cl. (c) of S. 115.

Where want of jurisdiction is established, no question of discretion arises and the court is bound to interfere apart from any question as to whether the party has other remedies open to him.

Quaere if S. 38 of the Presidency Small Cause Courts Act applies to proceedings under S. 41. *Ramakrishna* v. *Haji Dawood* 1 referred to.

A lease for 15 years, with a provision for 6 months notice thereafter before the lessee could be asked to vacate is not determinable by a notice given before the expiry of the 15 years.

Petition under section 115 of Act V of 1908, praying the High Court to revise the decree of the Presidency Court of Small Causes at Madras in Ejectment Suit No. 91 of 1913.

M. O. Parthasarathi Aiyangar and *K. V. Krishnaswami Aiyar* for the Petitioner.

N. Chandrasekhara Aiyar for the Respondents.

The Court delivered the following

Judgment:—This was a proceeding in ejectment under S. 41 of the Presidency Small Cause Court Act: Defendant executed a rental agreement on the 14th June 1897 agreeing to occupy the site for 15 years by building a house on it. The agreement provides "In case you require the aforesaid land if you give me 6 months' previous notice after the aforesaid 15 years, I shall accordingly vacate the land, remove the superstructure I had built thereon and put you in possession of it." Plaintiff gave two notices, one in October 1911, and another on the 13th December 1913 claiming possession on

1. (1907) I. L. R. 31 B. 259.

the 31st of that month: plaintiff's case is that the tenancy came to an end by efflux of time on the 14th June 1912 and that as he gave notice in October 1911, defendant was bound to vacate the premises: Defendant contended that the first notice was bad as it was before the 15 years were over, that the second notice did not terminate the tenancy as it did not allow 6 months' time to vacate, and that the Small Cause Court had no jurisdiction to entertain the application under S 41. The learned Third Judge of the Small Causes Court overruled these objections and gave possession to the plaintiff directing that "the defendant should remove the superstructure at his cost and deliver the site on 1st May 1913" Defendant moves the High Court to revise this order: A preliminary objection is taken to the jurisdiction of the High Court to entertain the Revision petition. Mr. Chandrasekara Aiyar who appeared for the plaintiff has argued this point very fully and clearly before me. His contention is that under S. 8 of Act V of 1908 only certain sections of the Code of Civil procedure were made applicable to suits or proceedings of Small Cause Courts, and that S. 115 is not one of those sections He also contended that as S. 23 of Act XV of 1882 which related to the provisions of the Code of Civil Procedure applicable to Presidency Small Cause Courts was repealed by Act I of 1895, and as the said section referred to the schedule which made S. 622 of the Old Code corresponding to S. 115 of the present Code applicable to Small Cause Courts, by implication the power of the High Court to interfere in Revision under S. 115 was taken away: and he quoted *Ismalji Ibrahimji Nagree* v. *N. C. Macleod,* [1] in support of this position. S. 8 of the Code of Civil Procedure enumerates the sections which are made applicable " to any suit or proceeding in any Court of Small Causes." The petition before me is not a suit or proceeding in a Small Causes Court. Nor does the repeal of S. 23 affect the question. It was due to the fact that the Civil Procedure Code contained provisions relating to the provisional powers of the High Court and it was thought unnecessary to provide for it in the Small Cause Courts Act. As regards *Ismaljee Ibrahimjie Nagree N C. Macleod, Receiver* [1] it is true that Mr. Justice Beaman expressed a doubt whether S. 622 of the old Code was applicable to applications

1. (1907) I. L. R. 31 B. 188.

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1. (1907) I. L. R. 31 B. 138.

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Seshagiri Aiyar, J.

to revise suits or proceedings from Small Cause Courts. But the learned Judge gives no reason for his conclusion. There can be no doubt that the language of S. 115 is in terms applicable to cases coming from Presidency Small Cause Courts. They are subordinate to the High Court (*Vide* S. 3 of Act V of 1908 and S. 6 of Act XIV of 1882) Therefore unless by any express provision the power of the High Court is taken away, it will have jurisdiction to revise the proceedings of Small Cause Courts. The practice in the Presidency has been to entertain these applications. I am fortified in this view by the decision of the Calcutta High Court in *Haladhar Maiti* v. *Choytonna Maiti* [1]. In *Ramadhin Bania* v. *Sewbalak Singh* [2] and in *Sarat Chandra Singh* v. *Brojo Lal Mukerji* [3] the learned Judges of the Calcutta High Court came to the conclusion that the High Court was competent to exercise revisional jurisdiction, but directed that the petition should be disposed of by the Judge sitting in the Original Side of the High Court. That is not the practice which has been adopted by the Madras High Court. I must overrule the preliminary objection and hold that the High Court has power to revise the proceeding under S. 115 of the Code of Civil Proceedure.

On the merits, the question turns upon the construction to be placed on the rental agreement, Mr. Parthasarathi Aiyangar for the petitioner contends that the language of the rental agreement imports that the defendant was not to be disturbed under any circumstance within the 15 years of his lease, and that on the expiry of that period, the plaintiff can recover possession only after giving six month's notice. It is contended on the other side that the term as to six months' notice was inserted in order that the defendant may know at the end of the 15th year that the landlord intends to eject him and that the notice of October 1911 is sufficient compliance with this condition. I am unable to accept this costruction. The language is plain and unambigious; and that parties apparently contemplated the continuance of the tenancy on the original terms after the fixed period was over, leaving it to the landlord the right to claim possession after giving six months notice. I cannot accept the conclusion of the learned Judge that the six months notice was to be anterior to the 15 years and not

1. (1908) I. L. R. 30 C. 588.
2. (1910) I. L. R. 37 C. 714.
3. (1908) I. L. R. 30 C. 986.

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subsequent. There are no Indian authorities on the construction to be placed on similar clauses in rent agreements. Nor are the English authorities uniform. In *Thompson* v. *Maberly* [1] it was held where a tenancy was "for 12 months certain and six months' notice to quit afterwards," notice given to terminate the tenancy at the end of the first year was good. In 61 Law Times page 729, Lord Coleridge says this with reference to *Thompson* v. *Maberly* [1] "Mr. Cross relied on the case" of *Thompson* v. *Maberly* [1] (ubi. sub), where Lord Ellenborough, C. J. stated that if premises are taken for "twelve months certain and six months, notice to quit afterwards," the tenancy may be determined by a six months notice to quit expiring at the end of the first year." That case is not, however, quite satisfactory, as it appears to have been decided on the meaning of the word certain, and as Lord Campbell points out in a note, the decision was for the plaintiff on another point, so that Lord Ellenborough's observation was obiter. It is true that, in the case of *Brown* v. *Symons and another* [2] in the Common Pleas, which was an apprenticeship case and turned upon the words "for twelve months certain", *Thompson* v. *Maberly* [1] (ubi-sub) was cited in the argument, and was not disapproved of. But I think that in a case of a similar agreement where the word "certain" does not occur, it would be very doubtful whether *Thompson* v. *Maberly* [1] (ubi-sub) should be treated as an authority." The same view was held by the Court of appeal in *The Canon Brewer* v. *Nash*[3] The case *Brown* v. *Symons and another* [2] related to a contract of service and does not affect the decision in the above cases. In Halsbury's Laws of England Vol. XVIII page 444, the proposition is thus stated in the notes. "In general where there is a fixed term and then the tenancy is determinable on notice, the notice cannot, it seems, be given until after the expiration of the fixed term." This view is in consonance with reason and justice. I therefore hold that the tenancy was not terminated by the notice of October 1911 and that the notice of the 13th of December 1912 was not sufficient.

The further question now arises, whether the Presidency Small Cause Court had jurisdiction to direct possession to be given under S. 41 of the Act. The second paragraph of that

1. (1811) 2 Campbell 573. 2. (1860) 8 C. B. N. I. 208 S.C. 29 L. J. 251, C. P
3 (1898) 77 Law Times 648 (C. A.)

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section makes the determination of the tenancy a condition precedent to the exercise of jurisdiction. It must be remembered that the power to pass orders relating to immoveable property is an exceptional authority conferred on the Presidency Small Cause Courts. The conditions under which this power can be exercised must therefore be strictly complied with; if the conditions fail, the jurisdiction does not exist. It was argued before me that the defendant has other remedies and that he is not entitled to invoke the aid of the High Court's revisional powers. A number of cases were quoted before me. I take the principle of these decisions to be that where there is discretion to be exercised, the High Court will ordinarily refuse to interfere, if the petitioner has other remedies. Generally speaking, only cases which are sought to be brought under clause (*c*) of section 115 will be affected by this rule. I am of opinion that where want of jurisdiction has been established, no question of the exercise of discretion arises and that the High Court cannot condone absolute want of jurisdiction. The decision of Mr. Justice West in ***Amritra'v Krishna Deshpande*** v. ***Balakrishna Ganesa Amrapurkar*** [1] is not against this position. In the view that I have taken of the right of revision, it is not necessary to consider whether the remedy by way of retrial is open to a party against whom an order under S. 41 has been passed. I need only mention that it has been decided in ***Ramakrishna Sitaram*** v. ***Haji Dawood Ismail*** [2] that such proceedings should not be dealt with under Chapter VI of the Presidency Small Cause Courts Act.

The decision of the learned Judge must be set aside and the application under S. 41 must be dismissed with costs throughout.

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1. (1887) I. L. R. 11 B. 488.

2. (1907) I. L. R. 31 B. 259.

PRIVY COUNCIL.

Present:—Lords Moulton and Sumner, Sir John Edge and Mr. Ameer Ali.

On appeal from the High Court at Madras.

Chidambaram Chettiar *Appellant.*

v.

Srinivasa Sastrial and others *Respondents.*

Chidambaram Chettiar v. Srinivasa Sastrial.

Alienation in fraud of creditors—Transfer for consideration—Want of good faith—Right of assignee in respect of amounts actually paid by him to discharge debts of the assignor.

Their Lordships affirmed the decision of the High Court of Madras in *Chidambaram Chettair* v. *Sami Aiyar* (1) holding that the alienation was in the circumstances void as against creditors.

As to the rights of the assignees not on the footing of the assignment but on other grounds, such as the actual payment of debts, their Lordships were of opinion that the point was not before the lower Courts or before them.

Consolidated appeals heard *ex parte* against the decretal orders of the High Court, dated July 18, 1906 affirming the Judgments of the Subordinate Court of Kumbakonam dated December 23, 1901 and September 27, 1902.

The material facts will be found in the report of the case before the High Court *Chidambarm Chetty* v, *Sami Aiyar* [1] The High Court having dismissed the appeals, the appellant appealed to the Privy Council.

De Gruyther, K. C. with him *Kenworthy Brown* for the appellant contended that the assignment was not made with intent to defeat or delay the creditors of Sami Iyer and that there was no evidence to that effect. The assignee took the assignment in good faith without notice of any such intent and for consideration—which right of the assignee vested in the appellant. Even if there were any fraud in the contemplation of the original parties, the appellant was not privy to it, nor had he any notice thereof. The assignment therefore could not be vitiated.

The Respondents did not appear.

The Judgement of their Lordships was delivered by

Lord Moulton.—Their Lordships are of opinion that the two decisions appealed against are correct; that the High Court acted rightly in setting aside the two assignments, the one to Annamalai and the other to Chidambaram, and that no valid

1. (1906) I.L.R. 30 M. 6.

Chidambaram Chettiar v. Srinivasa Sastrial

proceedings can therefore be based on either of those assignments. The question whether any of the parties can establish rights based, not on the assignments, but on other grounds, such as the actual payment of debts, is a point which was, in their Lordships' opinion, not before the Courts below, and is not before their Lordships, and on that point therefore they pronounce no opinion.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be dismissed.

Solicitors for appellants: Chapman, Walker and Shephard.

PRIVY COUNCIL.

Present:—Lords Shaw and Moulton and Mr. Ameer Ali.

[On appeal from the High Court at Allahabad.]

Musammat Bakhtawar Begam — *Appellant*

v.

Musammat Husaini Khanam and another — *Respondents.*

Musammat Bakhtawar Begam v. Musammat Husaini Khanam.

Mortgage by conditional sale—Redemption—Indian Limitation Act XV of 1877, Sched. II Art. 148—Period specified in the mortgage deed for redemption—Date from which limitation begins to run.

Where a person had executed a mortgage by conditional sale redeemable in nine years and it was alleged that at the end of the third year the entire amount of principal and interest was satisfied from the usufruct.

Held that Art. 148 Sched. II of the Limitation Act of 1877 applied and the period of 60 years began to run from the end of the third year when the right to redeem came into existence.

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor.

Consolidated appeals from a Judgment and Decree of the High Court dated Novmber 11, 1907 modifying a Judgment and Decree of the Subordinate Judge of Cawnpore dated January 4, 1904.

The facts of the case are sufficiently set forth in their Lordships' Judgment.

De Gruyther K. C. (with him *Dube*) for the Appellant contended that under S. 62 of the Transfer of Property Act, in a usufructuary mortgage the right of the mortgagor to recover

possession of the property accrued when according to the terms of the mortgage the mortgage money was paid up out of the rents and profits of the property. In the present case the period of limitation under Art 148 Schedule II of the Limitation Act began running from the time the principal with interest was satisfied out of the rents and profits, that is to say, at the end of the third year *i. e.* 1834.

The suit was brought after the expiration o 60 years *i. e.* in 1899. By S. 50 of the Code of Civil Procedure of 1882, the plaint ought to have shown the grounds on which exemption from the law of limitation was claimed and the plaint ought to have been rejected at the very outset on the ground of limitation according to S. 54 of the Code of Civil Procedure.

Sir E. Richards K. C., Ross K. C. and *O'Gorman* for the Respondents argued that the mortgage could not have been redeemed before 1839 and therefore the period of limitation if at all would run from that date. That it was so was apparent from the plaint which stated that the mortgage was for nine years. This was confirmed by a petition which was made to the Collector in 1830 for the mutation of names of the mortgagees in place of those of the mortgagors. In 1867 the defendant (Ali Hoossain Khan) who created a mortgage of some of the properties in question laid down conditions as to the payment of mortgage money. By an agreement of 1830 between the mortgagors and the mortgagees the mortgaged properties were to be redeemed by a payment of principal and interest. There were various proceedings between 1830 and 1899 which went to shew that parties took the mortgage irredeemable unless the amount due was paid.

Reference was made to *Vadju* v. *Vadju* [1]

De Gruyther K. C. replied.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali.—The suit which has given rise to these consolidated Appeals from a Decree and Judgment of the High Court of Allahabad was instituted by the Plaintiff-Respondent in the Court of the Subordinate Judge of Cawnpore for the redemption of a mortgage executed so long ago as the 6th of January 1830. The Suit was brought on the 6th of January 1899, and the only and vital question presented at the bar for determination

1. (1880) I. L. R. 5 B. 22.

Musammat Bakhtawar Begam v. Musammat Husaini Khanam.

in this case is whether the claim is barred by the Statute of Limitation (Indian Act XV of 1877).

The Plaintiff Husaini Khanam alleges that on the 6th of January 1830 her father, Aga Fateh Ali, in conjunction with another relative named Aman Ali, executed a mortgage by way of conditional sale in respect of 12 villages lying within the district of Cawnpore in favour of one Ata Ullah Khan, since deceased. The other Plaintiffs are persons who have acquired title from Husaini Khanam. The principal Defendant in the action was one Ali Husain Khan, who was the representative of Ata Ullah. He died since the decision by the High Court in the Appeal from the Decree of the Subordinate Judge, and he is now represented by his widow, Bakhtawar Begam, the Appellant. The remaining Defendants are assignees of interest created by the original mortgagee or his representatives in the mortgaged premises.

The mortgage deed is not forthcoming, but both the Courts in India have found that the contract between the parties to the transaction is, for all material purposes, substantially set forth in the proceeding of the Collector's Court dated the 18th of September 1830, on an application for mutation of names in the Revenue Register.

The contract of mortgage by conditional sale is a form of security recognised throughout India, and its incidents have been embodied in S. 58 of Act IV of 1882 (the Transfer of Property Act). The form it usually takes is for the mortgagor to execute a deed of sale in respect of the mortgaged property in favour of the mortgagee who on his side executes an agreement covenanting that on the liquidation of the debt, according to the terms of the contract, the sale would be cancelled, and he would re-convey the property to the mortgagor. On the breach of the condition relating to repayment the contract executes itself, and the transaction becomes one of absolute sale.

The proceeding which contains the contract in this case is set out in full in the Judgment of the High Court. The only material part to which their Lordships need refer is the clause relating to repayment, which runs as follows :—

"On being asked Sital Parshad, attorney of Ataullah Khan, stated that his "client had executed and made over to Mirza Aman Ali and Fateh Ali an agree- "ment to the effect that the sale would be cancelled on payment of the amount of "consideration in nine years, and that, therefore, the sale was not an absolute but "a conditional sale."

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The period of limitation under the Indian Statute for suits for redemption or for recovery of possession of mortgaged property is sixty years from the date of the accrual of the right to redeem or to recover possession (Art. 148, Sched. II., Act XV of 1877). The Subordinate Judge was of opinion that limitation began to run from the date of the contract, and accordingly held that the suit was barred. The High Court of Allahabad on appeal have taken a different view. The learned Judges considered *inter alia* that the right to redeem in respect of the seven villages which were in the possession of the mortgagee's representatives accrued only on the expiration of the period of nine years for which the contract was made, but that as regards the five villages which had been transferred by the mortgagee to third parties the claim was barred. They accordingly decreed the plaintiffs' claim in respect of seven villages and dismissed it with regard to the rest.

The Defendants have appealed from the first part of the High Court Decree, against which there is a cross-appeal on the part of the Plaintiffs.

The first question to determine is whether the Plaintiffs' right to redeem is affected by 60 years' limitation, for in that case her claim must fail *in toto*. The learned Judges dealing with this point give expression to their opinion in the following passage in their Judgment :—

"If the meaning of this contemporaneous agreement was that the mortgagors "might redeem at any time within the period of nine years, the Plaintiff's claim is "barred by limitation. If, on the other hand, the intention of the parties was that "the debt should remain outstanding for a period of nine years certain, then the "right to redeem only accrued at the expiration of that period. Ordinarily, a "mortgagor cannot, before the time limited for payment to the mortgagee expires, "take proceedings to redeem. The reason for this is, that it was the agreement of "the parties that the mortgage should, during the intervening time, remain as "security for the money advanced, and therefore it is not competent for either party "to disturb that relation."

And they refer to a number of cases in support of their conclusion. Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor. In the present case had the matter depended

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only on the construction of the contract as given in the Proceeding of the Collector, much might be said in support of the High Court's conclusions. The expression that "the sale would be "cancelled on payment of the consideration in nine years" is certainly ambiguous.

But here the Plaintiff's case is that the mortgagors were entitled to recover the property within the period of nine years on the liquidation of the debt with the usufruct of the property. In the second paragraph of the Plaint the Plaintiffs state as follows:—

"The terms of the mortgage as agreed were that the mortgagee should remain "in possesion of the said mortgaged villages . that the amount of profits, "if any, which shall remain after paying the Government revenue, interest, and "pay of the persons making the collections would be owned by the mortgagors and "applied in the payment of the principal, and that whenever the mortgage money "would be satisfied (out of the usufruct) or paid (by the mortgagors) before or "after the stipulated time the mortgaged property should be redeemed."

And the fact is emphasised in paragraph 8, which is in these terms:—

"The whole amount of the principal mortgage money with interest mentioned "in the mortgage-deed was paid up at the end of the year 1245 Fasli according to "the account which is annexed to this plaint and forms part of it. No portion of "the mortgage money, interest or any other demand is now due; on the other "hand, there is a surplus amount due to the Plaintiffs."

In their Lordships' judgment this is not a case of a wrong construction of a clause or condition in the contract. It is a distinct allegation of fact on which the right to recover possession is founded. But the matter does not rest there. The Plaintiffs produced with the plaint a statement of accounts in respect of the 12 villages based on the settlement records to show the amounts realised by the mortgagee from 1830 to 1897. In this document it is clearly stated that the whole debt was satisfied in 1245 Fasli (4th September 1837—4th September 1838). From that time the balance of the realisations by the mortgagee after deduction of the legitimate outgoings is treated by the Plaintiffs as sums retained by him without any right.

If the fact be, as the Plaintiffs allege, that the mortgage debt became satisfied under the contract in 1838, the right to recover possession accrued then, and the suit is clearly barred.

Their Lordships are, therefore, of opinion that the decree of the High Court partly decreeing the Plaintiffs' claim should be set aside, and the suit dismissed, which will involve the dismissal also of the cross-appeal.

With regard to the costs, their Lordships think that Jamna Narain, who represents the original assignee of the five villages in respect of which the plaintiffs' suit has been dismissed by both the Courts in India, is entitled to the costs decreed in the Court of the Subordinate Judge and in the High Court, and to the costs of these Appeals to His Majesty in Council. As regards the other parties, their Lordships think the plaintiffs should bear the costs decreed against them in the First Court, but that each of the parties should bear their respective costs of these appeals and of the appeals to the High Court, including the costs incurred in the proceedings on remand. Musammat Bakhtawar Begam v. Musammat Husaini Khanam.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: T.L. Willson & Co.

Solicitors for respondents T. C. Summerhays and Son and Ranken, Ford and Chester.

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Subbammal *alias* Pichu Ammal ... *Plaintiff* * (*Appellant*)

v.

Krishna Aiyar, minor, through his father and guardian G. K. Lakshmana Iyer ... *Defendant* (*Respondent*)

Hindu Law-Female heirs holding for limited estate-Partition so as to preclude survivorship permissible—Deed—Construction—Words sufficient for the purpose. Subbammal v. Lakshmana Iyer.

Female heirs holding for limited estate can so divide as to preclude the rights of survivorship *inter se.*

The use of the words " Santati Paramparya mayi " " Sarva swtanthra Badiya mayi" with reference to the interest of each is a circumstance from which the intention to give up the right of survivorship may be legitimately inferred. Words like " We have no connection with each other's rights of properties " would place the matter beyond controversy.

Appeal under s. 15 of the Letters Patent from the judgment of the Hon'ble Mr. Justice Miller in Second Appeal No. 1004 of 1912 presented against the decree of the District Court of Tinnevelly in Appeal suit No. 427 of 1911 preferred against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 10 of 1911.

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* L. P. A. No. 254 of 1912. 17th December 1913.

Subbammal v. Lakshmana Iyer.

T. V. Seshagiri Aiyar, for Appellant.

T. R. Ramachandra Aiyar for Respondent.

The Court delivered the following

Judgment:—The first question arising in this Letters Patent appeal is whether when two female heirs A and B inheriting life interests in properties belonging to a male propositus divide the said properties not for mere convenience of enjoyment but under a contract containing terms which indicate that each of the female heirs intends to give up *in presenti* her life interest in the properties which fell to the share of the other female heir, such a complete relinquishment is valid so as to prevent the heir (A or B) from claiming those properties if she happens to surrive her Co-heir (B or A).

That question has been answered by this Court in the affirmative in *Sudalai Ammal* v. *Gomathi Ammal* [1] following similar answers given in several previous cases beginning with *Ramakkal* v. *Ramasami Naicken.* [2]

Mr. T.V. Seshagiri Aiyar ingeniously argued (if I understood him right) that such a relinquishment of the whole life interest by A involves a relinquishment of the right of survivorship which is in A, contingent on her surviving B and such a relinquishment is invalid under S. 6 of the Transfer of property Act.

This argument is based on the assumption that a vested life interest (which is a present interest well-known to the law and allowed by the law to be alienated) can be and ought to be divided into two extra-ordinary interests (not recognised by the law as alienable), namely (1) the right of A to enjoy the properties jointly with B during B's life-time *assuming that B will die before A*, and (2) the right in contingent possibility of A to get the undivided share of B by survivorship assuming again that B will die before A.

Not only are we of opinion that the above argument based on this division of an entire life interest in imagination into two interests unsustainable but even if there is anything in this argument, that is not a sufficiently strong argument to justify us in over ruling the current of decisions in this court during the last 15 years.

The next question is whether the partition deed Ex. A. does contain words indicating that, so for as plaint

1. (1912) 23 M. L. J. 355. 2. (1899) I. L. R. 22 M. 522.

Subbammal v. Lakshmana Iyer.

schedules I and III (document schedules II and IV properties) are concerned, the plaintiff (appellant) intended to give up her life interest in those properties. The words "*Sarva Swatantra Badyamayum* and "*Santhathi pravesamayum*" have been interpreted by the courts below and by the learned Judge of this Court (from whose decision the Letters Patent appeal has been filed) as indicating such relinquishment and alienation by the plaintiff and we are not prepared to say that they are wrong, though, if some other usual words, as, "we have no connection with each other's rights of properties hereafter but only connection by blood relationship," had been also inserted the matter would be beyond controversy. Probably such words were not added because the two sisters (plaintiff and the defendant's mother) did intend to retain common interest in the plaint second and third schedule properties and it is even contended that as regards the second schedule property, the parties intended the ordinary right of survivorship to take its course in favour of that sister (whether the plaintiff or the defendant's mother) who happen to survive the other. In short, the argument of the appellant's vakil based on the difference in the phraseology of the document in different portions that is, the fact that the tamil words already referred to are attached to the enjoyment of the 1st and the 3rd schedule properties and such words are omitted in relation to the 2nd schedule house to be enjoyed in common, strongly supports the construction adopted by the lower courts that the plaintiff gave up completely her life-interest in the 1st and 3rd schedule properties in favour of the defendant's mother and of the defendant's mother's descendants.

The last question is whether as regards the 2nd schedule house the plaintiff gave up her life-interest completely or whether she or her sister were to enjoy it in common the usual contingent right of survivorship being left unaffected in favor of that sister who happened to survive the other. The difference of language above pointed out supports the plaintiff's case on this point and though the 12th ground of the second appeal Memorandum treats the 2nd and 3rd schedule properties on the same footing, that mistake should not be pressed against the appellant when the language of the document Ex. A. itself is reasonably clear. But as regards this property, the plaint 2nd schedule house, the plaintiff has by Ex. I sold away her life-interest in

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half the house to her sister and cannot claim that share now and though the whole house was claimed by the plaintiff in the plaint, the 2nd appeal relates only to the other half of the said house. This other half share of the above house, has come back to her on her sister's death.

In the result, there will be a preliminary decree for the plaintiff for partition of the 2nd schedule house into two equal shares and for possession of one half share with liberty to the defendant and the plaintiff to apply under the Partition Act and with liberty to the Court of first instance to pass orders under that Act.

As the appellant has substantially failed, she will pay half the respondent's costs in this appeal. The order as to costs passed in the Lower Courts will stand.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Seshagiri Aiyar.

Saripaka China Mahadeva Vazulu, and others ... *Appellants* * (*Plaintiffs*. Nos. 3 to 6).

v.

Muthura Suryaprakasam ... *Respondents* (*Defendants*).

Saripaka China Mahadeva Vasulu, v. Muthura Suryaprakasam.

Purohitam—Office—Not recognised by law—Monopoly to officiate as priest—Against public policy—Immoveable property—Offices attached to temples.

Purohitam Office is not one which will or should be recognised by Civil Courts *Ramakrishna* v. *Ranga* (1) followed.

Per Sadasiva Aiyar J: It is against public policy to recognise a monopoly of the right to officiate as a priest which is a legitimate calling for all Brahmins. Offices attached to temples stand on a different footing.

Per Sheshagiri Aiyar J. Purohitam is not immoveable property so as to be capable of being leased out.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in A. S. No. 581 of 1911 preferred against the decree of the Court of the District Munsif of Parvathipur in O. S. No. 147 of 1910.

Patanjali Sastri for ***P. Narayana Murthi*** for Appellants.

*V. **Ramesam*** for Respondent.

The Court delivered the following

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* S. A. No. 2299 of 1912. 12th March 1914.

1. (1884) I. L. R. 7 M. 424.

Saripaka Chinna Mahadeva Vazulu, v. Muthura Suryaprakasam.

Sadasiva Aiyar, J.

Judgments: *Sadasiva Aiyar J*:—Plaintiffs are appellants. In the plaint they state that they are entitled to the hereditary purohitship of all the villages in the Chemudu Zamindari and that they alone are entitled to officiate as purohits at the ceremonies performed by the Chemudu Zamindars and also for the people in the villages in the zamindari. They further allege that according to mamool, they employed defendant to perform ceremonies in those villages on his agreeing to pay them Rs. 12 a year and that he has not paid Rs. 12 due for Plavanga (1907-08) and the suit was brought to recover that amount.

The lower appellate Court found that there was no contract between the plaintiffs and the defendant for the year Plavanga and that therefore the suit ought to be dismissed. I do not wish to base my judgment upon this finding of fact as I am strongly against the recognition of an office which could give rise to an exclusive right to officiate as purohit for a particular person or in a particular village or villages, especially, a right which can be enforced in courts of law. I adopt the arguments of the learned Advocate General as reported at page 63 in *Valeswara Aiyar* v. *Muthukrishna Aiyar* [1] and I hold that a monopoly to officiate as purohit should not be recognised by Courts and that it is against public policy to allow any such claim. One of the lawful occupations of a Brahmana is officiating as priest for others and receiving whatever is freely and voluntarily given after such priestly office is performed. But there is no authority in the Shastras for the view that the occupation carries with it the right to put the duties on the shoulders of a third person while receiving a portion of the remuneration given for the performance of the duties. That a custom to claim a monopoly to pursue an occupation which is reasonable at one time may become unreasonable at another time has also been suggested by Lord Macnaghten in the course of the arguments before the Privy Council in the case in *Sadagopachariar* v. *A. Rama Rao* [2]. The right to exclude other people from following a legitimate calling or profession (the calling of purohitship being open to all Brahmins) cannot be countenanced by courts. There can be no individual property in any such common calling, though, of

1. (1910) 21 M. L. J. 57.

2. (1907) 11 C.W.N. 585 at p. 590. I.L.R. 30 M. 80 185 P.C : 17 M.L.J. 240.

Saripaka China Mahadeva Vasulu, v. Muthura Suryaprakasam.

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course the following of that calling by the paintiff as an individual can give rise to rights in him as against those who have entered into contracts and obtained benefits from the exercise of that calling by the plaintiff.

The plaintiffs in this case not only claim the office but they claim it as an hereditary office. In S. A. Nos. 1470 and 1471 of 1911, I have ventured to state that a claim to succeed by hereditary right to any office, especially to an office involving spiritual minsitrations, should be looked upon with strong disfavour by courts. I also hold that it is contrary to the Hindu Sastras to recognise any such hereditary right, in a spiritual office, the right to hold such on office depending on the requisite spiritual qualifications. In *Dwarakunath Misser* v. *Rampertab Misser* [1] Mr. Justice Mookerjee has advanced cogent arguments for the position that though when an office is attached to an idol or some other image of the deity, it may be recognised by court as an exclusive right to perform religious ceremonies for pilgrims or to officiate as priests for pilgrims or other ill-defined class of persons cannot be recognised by courts so as to entitle the plaintiffs, (the alleged holders of that right) to maintain suits for the voluntary offerings which are given by those who obtain spiritual ministrations at certain theerthams or places. The cases quoted by the appellants' learned vakil namely, *Bheemacharyalu* v. *Ramanujacharyulu* [2] *Bashiakar* v. *Thathackariar* [3] and the case in C. R. P. No. 352 of 1909, related to offices attached to a temple or a mosque and those decisions throw no light on the decision of the question now in dispute.

No doubt, in Bombay, the exclusive right to officiate as a purohit for certain families or in certain villages have been recognised by the courts as entitling the holders thereof to bring suits to establish the said rights and to claim emoluments wrongly received by the defendants, though the emoluments were in the nature of voluntary offerings and even to enjoin the spirtual clients, so to say, from resorting to religious ministrations from other than the holders of the purohit office. Probably it is too late in Bombay to go back from the long set of precedents which have been established, recognising such rights. But as I said before, my mind is clear on the point that the purohit office

1. (1911) 19 Cal. L.J. p.449. (at p. 451 to 453). 2. (1907) 17 M.L.J. 498.
3. (1910) 20 M. L. J. 580.

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should not be recognised as an office entitling anybody to claim an exclusive privilege or monopoly to give spiritual ministrations to particular clients, or for the receiver of the emoluments of which a suit will lie in a civil court unless of course the spiritual ministrations had been already given by the plaintiff to a defined client in consideration of the promise of a pecuniay reward. The sale or lease or mortgage of any such office or exclusive right should not be recognised as it is opposed to the Hindu religion and also to public policy.

In the result, I dismiss the second appeal with costs.

Seshagiri Aiyar J:—I agree in the conclusion at which my learned brother has arrived. The discussion before us in this case is not sufficient to warrant the conculsion that the right to lease the privilege of ministering to clients on religious occasions is opposed to public policy and I do not base my judgment on that ground. The Subordinate Judge finds that the plaintiffs are the hereditary purohits of the village in question. That finding imports nothing more than this, that the people in the village are in the habit of asking the aid of the plaintiffs for spiritual ministrations. It has been held in this court a quarter of a century ago that a person who has been in the habit of engaging the services of a particular purohit for a number of years cannot be restrained from availing himself of the services of others (See *Ramakrishna* v. *Ranga* [1])That decision has been followed ever since. See *Valeswara Aiyar* v. *Muthukrishna Aiyar* [2], and the cases quoted by the learned vakils for both sides in this case. I do not think that it can be said that purohitam is an office at all, that it is hereditary and that it is immoveable property, which can be leased. There is a shorter ground upon which the second appeal can be disposed of. The plaintiffs have failed to prove that there was any agreement by the defendants to pay the plaintiffs any portion of the moneys paid to them for the religious services rendered by them. The Subordinate Judge finds that the written contract for two years is not sufficient to enable him to infer that the defendants for all time to come contracted to pay them a share of the fees collected. I see no reason to differ from him in this conclusion. I agree with him and dismiss the second appeal with costs.

1. (1884) I. L. R. 7 M. 424. 2. (1909) 21 M. L. J. 57.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis, and Mr Justice Sadasiva Aiyar.

Narayana Nadar *Petitioner (accused)*.

Criminal Procedure Code, Sec. 195—grant of sanction—Findings in case and counter case—No independent enquiry at time of granting sanction—Police reports, reliance on—Nature and exercise of the powers under clause 6 of S. 195.

Where a Magistrate referred a complaint to the Police and on their reporting it to be false, dismissed it and without holding any further inquiry gave sanction to prosecute the complainant for making the complaint.

Held, that S. 195 Criminal Procedure Code does not require that an independent inquiry should be held on an application for sanction or that the sanction should be based only on legal evidence taken at such enquiry and as the Magistrate had before him not only the police report but also the judgment in another case tried by his predecessor in which the appellant's case had been fully investigated and found to be false, the sanction was not illegal.

Queen Empres v. *Sheik Beari* explained.

Per *Sadasiva Aiyar J* (Wallis J. concurring). A third appeal in sanction matters though permitted by law should, as a matter of practice be rejected unless something more than mere technical irregularity or illegality is made out.

It was not intended by cl. 6 of S. 195 that the appellate authority was bound to revoke the sanction whenever some irregularity or even illegality is shown in the proceedings of the authority granting sanction.

The High Court should not interfere with the discretion of the Subordinate Courts in the matter of the granting of sanction unless there is some strong *prima facie* ground for holding that there is no reasonable probability of having a conviction or that the party against whom sanction is granted is innocent or that it is inexpedient to grant sanction.

A sanction granted cannot be set aside merely on the ground that the courts below have also relied upon probabilities which cannot be used at the trial unless such irregularity has caused a failure of justice.

Where it cannot be said that the Magistrate has substituted the judgment of the Police for the Judgment of the court, the mere fact that the court has referred to the Police report in granting the sanction, does not vitiate the sanction.

Quære if the judgment in the other case would not be evidence under S. 11 cl. (2) of the Evidence Act.

Obiter. A preliminary enquiry is not essential in all cases even when the court takes action under Sec. 476.

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order dated 10-9-1913 of the Sessions Court of Tinnevelly in Criminal Mis Petition No. 22 of 1913 (in Sessions Case No. 61 of 1913), presented against the order of the District Magistrate of Tinnevelly in Mis. P. No. 605 of 1913 (D. Dis. No. 517 of 1913 dated 17-7-1913) presented against the order of the Court of the

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* Cr. M. P. No. 428 of 1913 18th March 1914.

Stationary 2nd Class Magistrate of Srivaikuntam in case No. 4 of 1913 according sanction for the prosecution of the petitioner herein for an offence under S. 211. I. P. C.

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Mr. A. Swaminatha Aiyar, Vakil for the Petitioner, *Mr. C. Sydney Smith,* for the Public prosecutor on behalf of the Government.

A. Swaminatha Aiyar.—In this case there has been no enquiry. Neither the complainant nor his witnesses have been examined. The sanction is based purely on the police report and the judgment in the counter-case. Even the judgment does not form part of the record. It is not even the same Magistrate that has convicted the petitioner in the counter-case that has given sanction. The list of witnesses given in the complaint is different from that in the counter-case.

The sanction based on police report is illegal *Queen Empress* v. *Sheik Beari* [1] which was followed in *Babu* v. *Babu* [2].

The sanction must be based on evidence which will be legally admissible at the trial. 26 M. 119; 27 M. 54; 7 C. W. N. 423; 22 M. L. J. 419. (See the observations of Sundara Aiyar, J.) The same principle applied to cases under S. 476, *Kachi Madin Lubbai* v. *The Emperor* [3].

There must be some preliminary enquiry though it is not so specifically stated in S. 195. In same cases under S.476 it has been held that a preliminary enquiry is necessary. (See the observations of Abdur Rahim, J.) in *Moothavarapa Seshayya* v. *Ramayya* [4].

There must have been an opportunity afforded to examine witnesses before charge framed under S. 211, I. P. C. 5 C. W. N. 106, 8 All. 38, 6 Cal. 496, 14 Cal. 707 referred to.

The judgment in the counter-case is not admissible in evidence. The fact that the petitioner has been convicted and that his story was disbelieved may be evidence under S. 35 of the Evidence Act. But the reasons given are not evidence. S. 11 (2) ought not to be invoked. (See 31 Bom. 143, remarks of Beaman, J. pp. 158, 159.

The Public Prosecutor.—The witnesses might have been examined. But there is no hard and fast rule as these cases are very much like a case and a counter-case as for example in rioting cases.

1. (1886) I.L.R. 10 M. 232.
2. (1912) 22 M. L. J. 419.
3. (1911) 2 M.W.N. 9.
4. (1911) 2 M.W.N. 526.

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A. Swaminatha Aiyar in reply. The analogy would not apply as the two cases have not been tried together.

The Court made the following

Order: *Wallis J.*—The petitioner has been convicted of stabbing a certain person about sunset on 28th September 1912 in the course of a dispute about cattle. On that day, his father-in-law sent a telegram to the police at Tuticorin to say that the petitioner's house had been dacoited by some persons unnamed, in the absence of the petitioner though this is not expressly stated. On 20th October 1912, nearly a month later, the petitioner put in a complaint in which he charged the man who has since been convicted of stabbing and others of having committed the dacoity while he was away at a distant village, and named nine witnesses. The Sub-Magistrate examined the complainant and doubting the truth of the complaint which was put in very late and appeared to be intended as a counter charge to the charge of stabbing which was then pending against the complainant referred it to the police for investigation and report on the 26th October 1912. The police apparently did nothing until the petitioner had been tried and convicted in the stabbing charge on 30th December 1912. At the trial, as appears from the Judgment the petitioner's case was that he was absent on the day in question, that his house was dacoited in his absence that day by prosecution witness No. I and others and that it was in the course of this affray that prosecution witness No. I was stabbed. Somehow or other with the exception of the last addition his story was the same as that told in his complaint dated 20th October 1912. He called several witnesses including four of those mentioned in the complaint and the court found his defence to be false and convicted him on the charge of stabbing.

Subsequently to his conviction, the police referred his complaint as false on the ground among others that it had been brought as a counter-charge to the charge on which he had been convicted and a new Sub-Magistrate on 14th January 1913 passed an order setting out the substance of the police report and dismissing the complaint under S, 203 of the Code of Criminal Procedure. Sanction to prosecute the petitioner was granted subsequently on 16th April 1913 on the ground that the charge was a mere concoction intended to meet the charge on which the

petitioner had been convicted and reference was made to the order of 14th January 1913 dismissing the complaint.

On this, it is argued that the Sub-Magistrate has granted sanction merely on the police report contrary to the Full Bench Ruling in *Queen Empress* v. *Sheik Beari* [1] but as pointed out by the District Magistrate and the Sessions Judge in their orders confirming the sanction, the Sub-Magistrate had much more before him because the police report refers to the conviction of the accused subsequent to the filing of the complaint as going to show that the complaint was merely concocted as a counter-charge. A reference to the judgment convicting the petitioner shows, as already pointed out, that before the police referred the complaint as false, the allegations it contains had been set up by the petitioner by way of defence in the stabbing case and investigated by the Court in that case and found to be false and they held that it was not necessary that the evidence in that case should be taken all over again for the purpose of deciding whether or not sanction should be granted against the petitioner.

In my opinion the decision of the lower Courts was right. S. 195 (*b*) of the Code of Criminal Procedure which relates to sanction for certain offences "committed in or in relation to any proceeding in any court" does not say by what consideration the Court is to be guided nor does it prescribe as indispensable that the court should hold a fresh enquiry and take evidence for the complainant before granting sanction, a proceeding which would be quite unnecessary in cases where the Court has acquired a knowledge of the facts in the course of the proceeding in or in relation to which the offence is alleged to have been committed. All that is decided by the Full Bench in *Queen Empress* v. *Shiek Beari* [1] is that the Court should not grant sanction to prosecute for preferring a false complaint merely on the ground that the complaint had been referred by the police as false and dismissed under S. 203 of the Code of Criminal Procedure. There are no doubt certain *dicta* in the Judgments of the learned Judges which have been repeated in some subsequent cases that the order should be made on judicial evidence or legal evidence, but these *dicta* do not mean, as has been contended before us, that such evidence must have been given on the application for sancation,

1. (1886) I. L. R. 10 M. 232.

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or even on the hearing of the complaint itself. This is clear from the order of the Full Bench with reference to the first of the three cases referred to it. There they upheld a sanction given for the prosecution of a complainant who had preferred a charge of house-breaking and theft against a constable and others which was referred as false by the police who suggested that the complainant should be prosecuted. Before disposing of the application for sanction the Magistrate tried and acquitted the constable and others on a charge of assault preferred by the same complainants (her son and brother). It was held by the Full Bench that the sanction so granted merely on the strength of the Police report and the result of the investigation in the other case was not illegal. In the present case the evidence in the other case was taken by the court before the police referred the complaint now in question as false, and the result of those proceedings was one of the chief grounds on which they referred the case as false. No doubt the Magistrate who granted the sanction was not the same as the Magistrate who tried the counter-case against the present complainant, but the Court was the same and the judgment of the Court in that case was on record: and the result of that case was in my opinion a matter which might properly be taken into consideration in granting sanction in this case. I may add that I agree with the observations of my learned brother which I have had the advantage of reading and would dismiss the petition.

Sadasiva Aiyar, J:—Though this is called a Criminal Miscellaneous Petition, it is practically a third appeal from the order of the 2nd Class Magistrate of Srivaikuntam sanctioning the prosecution of the petitioner for an offence under S. 211. I.P.C. The Petitioner put in a complaint on the 20th October 1912 accusing 10 persons of having committed dacoity in his house on the 28th September 1912. The complaint was a very deliberate one as his father-inlaw had on the 28th September itself, sent a telegram to the Assistant Superintendent of Police charging about 50 persons with having committed dacoity, and this complaint of 20th October 1912 was practically a detailed expansion of that telegram. Then he was examined by the 2nd Class Magistrate on the 26th October 1912 as a complainant and he deposed that the facts stated in his complaint were quite

1. (1886) I. L. R. 10 M. 282.

true. The Magistrate felt doubt as to the truth of the accusation on two grounds (*a*) on account of the long delay in preferring the complaint and (*b*) as the complaint was put in as a counter case to the Calender Case No. 483 of 1912 against the petitioner. In that Calendar Case No. 483 of 1912 his defence was based upon almost the same allegations as formed the basis of his complaint. That defence was found false in that Calender Case No. 483 of 1912 after an elaborate enquiry and after the examination of the witnesses whom he produced as defence witnesses in that case. His complaint of the 20th October 1912 was forwarded by the Magistrate to the Police for investigation and the Police reported the case to be false. The Magistrate's similar view that the complaint was probably false, which had been arrived at by him on looking into the complaint and examining the complainant) was thus confirmed by the police report and he dismissed the complaint on the 14th January 1913. On the 10th March 1913, notice was sent to the petitioner to show cause why he should not be prosecuted for having brought a false complaint of dacoity. He appeared on the 28th March 1913 to show cause and he was heard. The Magistrate considered that the petitioner's allegation that without a proper enquiry he (the Magistrate) had dismissed his complaint was not accurate and that it was only after proper enquiry he dismissed the complaint as false and he therefore granted the sanction on the 16th April 1913. As I said before, this Criminal Miscellaneous Petition before us is a sort of third Appeal from the 2nd Class Magistrate's order, a petition to the District Magistrate to revoke the sanction and a petition to the Sessions Judge to revoke the District Magistrate's order refusing to revoke the sanction having been unsuccessful.

While I admit that under the law, as now settled, the petitioner has a right to come up on a sort of third appeal to the High Court, I am strongly of opinion that such petitions by way of third Appeal, should, as a matter of practice be rejected unlesss the records show not merely a mere technical illegality or irregularity, but that a palpably innocent man is sought to be prosecuted out of private grudge by his enemies. Here the police have obtained the sanction to prosecute the petitioner. The facts stated in his complaint have been enquired into in the counter-case brought against the petitioner and have been

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found to be false: the petitioner's complaint was, after his examination as complainant, strongly suspected to be false: it was found by the police also to be false when it was referred to them for investigation, and the improbabilities in his case were set out by the Magistrate in his order dismissing the case as false. Even supposing that the three lower Courts did not strictly act according to the instructions given for the guidance of the lower courts in some decisions of the High Courts, I do not think that this is a fit case in which the High Court should interfere on a petition. When the Criminal Procedure Code says in S. 195, clause 6, that a sanction given may be revoked by the appellate authority I do not think that it was intended that a higher authority was bound to revoke the sanotion whenever some irregularity or even illegality is shown in the proceedings of the lower authority giving sanction.

Even if I am wrong in this above view, I am not satisfied that in this case any illegality has been committed in the granting of the sanction though the petitioner's learned Vakil Mr. A. Swaminatha Aiyar argued the case of his client with much persistency and ability and raised several nice points of law. One of his arguments was that because section 476 of the Criminal Procedure Code refers to a preliminary inquiry before any steps are taken under it, there ought to be also a preliminary inquiry before sanction is granted under the analogous S. 195 of the Criminal Procedure Code. Even as regards S. 476 of the Criminal Procedure Code the words of the section are "after making any preliminary inquiry that may be necessary." This shows that a preliminary inquiry is not essential in all cases even when the court takes action under S. 476.

In *Abdul Ghafur* v. *Raza Hussain*[1] it was held that no such preliminary inquiry was necessary. A *fortiori* of course, under S. 195 in which there is no reference at all to "preliminary inquiry" is such an enquiry unnecessary. In fact, it has been held in *In the matter of Govindu*[2] that even want of notice to the accused does not invalidate the grant of sanction under S. 195 of the Code of Criminal Procedure.

The next contention was that under the Full Bench Ruling in *Queen Empress* v. *Sheik Beari*[3] the sanctioning of the

1. (1912) I. L. R. 34 A. 267. 2. (1902) I. L. R. 26. M. 592.
3. (1886) I. L. R. 10. M. 232.

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prosecution of a man for an offence is a judicial act and that act must be performed after forming a judgment upon legal evidence. In that case it was held as I understand the points on which all the learned Judges were agreed, that the Magistrate should not substitute the judgment of the police for his own judgment and cannot accord sanction merely upon the police report. This case in *Queen Empress* v. *Sheik Beari* [3] was considered by Spencer, J. in *Audimulam* v. *Krishnien* [4] at pages 427, 428, and 430. I adopt his reasoning so far as this point is concerned. I think that it is impossible for us to discriminate and say how far the Magistrate's order was based upon the patent unreliability of the statement made by the complainant when he was examined by the Magistrate (which statement is legal and material evidence) and how far it was based upon the police report or upon the fact that the facts mentioned in the complaint were found to be false in the counter-case. In the present case the records show, I think, that the Magistrate did not substitute the judgment of the police for his own judgment, and that one of the material facts which induced him to grant the sanction was that, in his own judgment after he had examined the Petitioner as complainant, he thought that the case was false. Even if there was any irregularity in his referring to the police report and to the fact that the petitioner's case was found false in the counter-case, that irregularity has not, in my opinion, occasioned any failure of justice and under S. 537 C.P.C., even if we were deciding an appeal we cannot interfere with his order on that ground. I might however, be permitted to say that in my opinion S. 195 of the Criminal Procedure Code does not state that the authority giving sanction should act only upon legal evidence. So far as the Madras cases go while they say that if the authority giving sanction is a judicial authority it should not grant sanction unless there is some legal evidence in support of the falsity of the complaint those cases ought not to be treated as enunciating the much wider proposition that if other probalities based on evidence which would not be admissible at the trial of the petitioner are also referred to by the authority giving sanction the grant of sanction becomes wholly illegal and ought to be revoked. I am not sure that for the purposes of coming to a conclusion whether the complaint was *prima facie* false the finding on the connected

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4. (1912) 22 M. L. J. 419.

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case will not be evidence under clause (2) S. 11 of the Evidence Act though it may not be evidence in the case instituted on that sanction. I do not think that we should be astute to impose more restrictions on the discretion of the sanctioning authority in the grant of sanctions than are contemplated by the legislature. The legislature itself in S. 195 Cr.P.C., has given no indication whatever as to the materials on which the court can be justified in awarding sanction and has imposed no such restrictions as are contended for. On page 239 of the case in *Queen Empress* v. *Sheik Beari* [1] the learned Judges refer without disapproval to the sanctioning Magistrate in one of the cases having taken into consideration the fact that the complainant was unsuccessful in a connected case. I think that we ought not to interfere with the discretion of the Subordinate Courts in the matter of the grant of sanction unless there is some *prima facie* strong ground for holding that there is no reasonable probability of having a conviction on the sanction or that it is otherwise inexpedient to award the sanction on the facts of the particular case or that the party against whom sanction was granted was probably innocent. In the result, I would dismiss this petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar, and Mr. Justice Seshagiri Aiyar.

P. M. A. Valliappa Chetty ... *Petitioner * in both (1st Plalintiff in both).*

v.

S. N. Subramanian Chetty ... *Respondent in both (defendant in both).*

Valliappa Chetty v. Subramanian Chetty.

Negotiable Instruments Act, Section 22—Hundi—Provision that no period of grace should be allowed—Validity of—Suit brought after the expiry of the period—Limitation—Two plaintiffs—Plaint signed by one plaintiff only—Presentation without authority—Representation after time—Ratification—after limitation period—Ineffectual.

Where a suit was instituted by two plaintiffs but the plaint was signed only by the 2nd who claimed to be the agent of the first and on the plaint being returned on the ground that the 1st plaintiff had not signed it, it was not re-presented till after the limitation period had expired.

Held there being nothing to show that the 2nd plaintiff was authorised to present the plaint on behalf of the first, the suit was barred.

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1. (1886) I. L. R. 10 M. 232.

* C. P. R. Nos. 95 and 96 of 1913. 18th March 1914.

Held also: *Per Sadasiva Aiyar J.*—The ratification of the 2nd plaintiff's act, of presenting the plaint if any, having taken place only after the period of limitation expired, it could not be allowed to prejudice the defendants.

Per Sadasiva Aiyar, J.—Parties cannot contract out of the benefit of the days of grace allowed by section 22 of the Negotiable Instruments Act and as such any contract to the contrary notwithstanding, a Hundi coming within the section becomes payable only after the expiry of the period of grace and a suit instituted within 3 years thereafter is in time

Per Seshagiri Aiyar, J.—No question of public policy being involved in the giving up of the benefit of the days of grace under S. 22, a contract to that effect will be enforced and in such a case limitation should be reckoned irrespective of the days of grace.

English and American law on the point referred to.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge of Ramnad in S. C. S. No. 1406 and 1407 of 1911.

K. V. Krishnaswami Aiyar for *A. Krishnaswami Iyer* for Petitioner.

A. Venkatrayalaiah for Respondents.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J*:—I have the great advantage of having read the Judgment prepared in this case by my learned brother.

It is often a difficult question to decide whether a statutory provision has been made solely for the benefit and protection of the individual in his private capacity or whether some public right and public policy is also involved in it. I am inclined not to go behind the plain words of a statute. S. 22 of the Negotiable Instruments Act clearly says that " every promissory note which is not expressed to be payable on demand, at sight or on presentment is at maturity on the third day after the day on which it is expressed to be payable." In the Contract Act, in the Transfer of Property Act, in the Negotiable Instruments Act and several other Acts there are numerous provisions made solely for the benefit and protection of the individual in his private capacity; and yet the legislature has thought it necessary whenever it wanted to indicate that the parties can waive the benefit of such provisions to begin such sections with the words " in the absence of a contract to the contrary" or similar words. As S. 22 of the Negotiable Instruments Act omits in a marked manner the provision in S. 14 of the English Bills of Exchange Act allowing

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the parties to contract that the bill shall come to maturity on the date fixed in it without the addition of days of grace I think that the promissory note governed by the Negotiable Instruments Act cannot dispense with the days of grace. As regards the case of *The East Indian Company* v. *Oditchurn Paul* [1] it is of course binding on me but it seems to me that it is rather against the defendant; Lord Campbell's words at page 112 are "There might be an agreement that in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations and an action might be brought for breach of such an agreement" (that is, as I take it, for damages for breach of such agreement). His Lordship however proceeds to say "but if, to an action for the original cause of action, the Statute of Limitations is pleaded upon which issue is joined...the defendant notwithstanding any agreement is entitled to the verdict." This rather shows that the Statute law could not be evaded by agreement of parties though such an agreement might form the basis of an independent action. I need not say that I put forward this conclusion of mine with some diffidence in view of the arguments which have been put forward by my learned brother to uphold the contrary view.

I entirely agree however with my learned brother on the 2nd point discussed in his judgment. I do not believe that the 2nd plaintiff had the authority of the 1st plaintiff to present or to sign the plaint on behalf of the 1st plaintiff when the 2nd plaintiff so signed and presented it.

I am also satisfied that there was no ratification by the 1st plaintiff of the 2nd plaintiff's said act before the period of limitation was over and any ratification after the expiry of the period of limitation cannot be allowed to the prejudice of the defendant I therefore agree that these Civil Revision Petitions should be dismissed with costs.

Seshagiri Aiyar, J:—The suit is brought on a hundi executed on the 18th of May 1908 which runs as follows:—

"180 days after the date (without grace) I promise to pay etc."

1. (1849) 7 Moore's P C. 85 S. C. 18 E. R. 811.

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The 180 days ended with the 14th of November 1908. The suit was instituted on the 15th November 1911. The question for decision is whether under S. 22 of the Negotiable Instruments Act the plaintiff can claim that limitation commenced to run against him only on the 17th of November when the 3 days of grace allowed by that section expired although the contract of the parties' excludes the days of grace. Under the English Law, the Bills of Exchange Act of 1882, S. 14 which corresponds to S. 22 of the Indian Act provides that the days of grace shall be included only when the bill itself does not otherwise provide. The Indian Act does not contain a similar provision. Moreover, there are provisions in the Act which protect rights of parties under contracts notwithstanding anything to the contrary in the sections of the Act. See sections 32, 35, 37 and 38. On this ground it is argued that the omission in S. 22 of words saving the contracts of parties implies that the legislature deliberately precluded parties from entering into contracts against the provisions of S 22. The Report of the Select Committee on the Negotiable Instruments Bill shows that an endeavour was made to omit all reference to days of grace in the Act itself, but that failed. I am not prepared to accede to the contention that the failure to save the rights of parties in S. 22 was a deliberate departure from the English Law. It is a case of accidental omission. There was no intention to enact a separate rule of law in this country on the question of days of grace. I may also point out that the provision that a note shall be payable only after the days of grace is *prima facie* for the benefit of the maker of the note; and if he chooses to give up his privilege, the promisee cannot insist upon his taking advantage of the rule. As pointed out in Halsbury's Laws of England, Vol. II, note to S. 806, "In all the continental countries provision for days of grace has been abolished." It can therefore be safely assumed that no question of public policy is involved in the inclusion or omission of provisions for days of grace. In 7, Moore's Privy Council Cases, page 85, Lord Campbell in delivering the judgment of the Judicial Committee points out that it was open to the parties to stipulate that the ordinary rules of limitation shall not bind them with reference to particular contracts, the reason of the rule being that the non-observance of the statute affects only private rights and private

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individuals and does not offend against public policy. In *Mac Allister* v. *Bishop of Rochester*,[1] *Lindley J*, held that private rights can be waived or renounced by parties to a contract; but, if one of the contracting parties happens to occupy a fiduciary position, it was not open to him to give up rights which inhere in the general body of the public and not in him in his private capacity. The learned Jûdge observes "we think therefore the well-known principles of equity on which the defence set up is based are not applicable to a case of this description." This observation was made in answer to the argument of counsel that public policy is not opposed to parties waiving private rights. In Maxwell's 'Interpretation of Statutes 4th Edition the general law is thus summarised at page 580. "Another maxim which sanctions the non-observance of a statutory provision is that '*Cuilibet licet renuntiare juri pre so introducte.*' Every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity and which may be dispensed with without infringing on any public right or public policy." The cases *Markham* v. *Stanford*[2] and *Walton* v. *Maseall* [3] are illustrations of this rule. The American Law on this point is very clear. In 7, Cyclopædia of Law and Procedure, page 871, it is stated, "Although the law-merchant allows days of grace, the parties may stipulate that they shall not be allowed, and if the instrument shows an intention, it will be given effect to. In some states the statute in terms allows grace only where the instrument contains no provision or stipulation to the contrary. The mere fact that an instrument or a memorandum therein states that it is due or payable on a certain day does not exclude grace. Even where there is no stipulation excluding days of grace, the right of grace may be waived by the party bound, as where a tender of payment is made on the day of maturity without grace and is refused on other grounds." The above authorities show that where the giving up of a benefit secured by law does not offend against public policy, or is not renounced by a person who holds a representative character, the courts will enforce the contract. In this case the parties have chosen to expressly stipulate that the days of grace shall not be counted in reckoning the due date; and the individual for whose benefit the

1. (1880) 5 C. P 194 2. (1868) 14 C B. N. S. 376.
3. (1844) 13 Mad. W. 458.

provision of law was intended has agreed to abide by the terms of the contract. I have therefore come to the conclusion that it is open to the parties to enter into a contract that the provisions of S. 22 relating to days of grace shall not apply to them; and it is not open to the promisee to insist that the defendant should be compelled to take advantage of the days of grace in order that the starting point of limitation for him may commence on their expiry. My decision is that the suit is barred by limitation.

The decree of the Subordinate Judge can be supported on another ground also. The suit was instituted by two plaintiffs but the plaint was signed only by the 2nd. The 2nd plaintiff claims to be the agent of the 1st. The court returned the plaint on the ground that the 1st plaintiff had not signed it; it was not represented until after the period of limitation was over. The affidavit filed to show that the 2nd plaintiff had authority to file plaints does not give particulars regarding the authorisation. I am unable to hold that the 2nd plaintiff had authority prior to the institution of the suit to file the plaint on behalf of the 1st plaintiff. The suit is therefore barred by limitation on that ground as well.

I dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Tyabji and Mr. Justice Spencer.

Ponaka Balarami Reddi and others *Appellants** *Plaintiffs Nos.* 1,2,4 *and* 5.

v.

Hazi Mahomed Abdul Aziz Badshah Sahib and others. *Respondents—Defendants.*

C. P. C. Ss. 278, 283 (N. C. Order 21 S. 58, 63.)—Joint order on two claim petitions—Construction—Attachment raised—Effect of, on order on claim petition.

Where a claim petition by the plaintiffs objecting to attachment on the ground that the property attached had been purchased by them prior to such attachment and a petition by another party who claimed the property by survivorship were heard together and a single order was passed raising the attachment, the ground given being that the property was joint family property which passed by survivorship and was therefore incapable of attachment for the debt of the deceased judgment-debtor, so far as the plaintiffs' petition went, however, the opinion of the court being against the *bonafides* of their sale.

*A. No. 218 of 1911 11th March 1914.

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Held: that the order could not be construed as one made against the plaintiff and even so, the attachment having been raised, plaintiffs were not bound to set aside the order.

Koyyana Chittena v. *Doosy Gavaramma* 1 distinguished.

Effect of raising attachment, withdrawal of execution petition &c., on orders on claim petitions considered.

Appeal form the decree of the District Court of Nellore in O. S. No. 25 of 1909.

S. Srinivasa Iyengar for Appellant.

S. Subramania Aiyar for Respondents.

The Court delivered the following

Judgments: *Tyabji J*:—The plaintiffs and defendants are rival claimants for the ownership of the property which is referred to in the plaint. The plaintiffs claim that they are entitled to it under a sale deed dated 27-7-1901; the defendants claim to be purchasers in a Court-sale in execution of a decree.

The learned District Judge has held that the plaintiffs are barred from suing on their title by the operation of S. 283 of the Civil Procedure Code 1882. He held that the plaintiffs were parties against whom an order (which is Exhibit II in the case) had been passed in previous execution proceedings in 1903 and that the suit not having been brought within one year from those proceedings, it is barred under Article 11 of the first schedule to the Limitation Act.

Exhibit II was an order passed in Civil Miscellaneous Petitions Nos. 440 and 451 of 1903 by the District Judge of Nellore on the 22nd September 1903. The order was that the attachment sought to be raised by the petitioners should be raised. It would therefore appear that Exhibit II cannot be interpreted as being an order against the plaintiffs within the meaning of S. 283. Exhibit II did that which the plaintiffs then desired to be done, namely, that the attachment should be raised. It is true that in the course of Exhibit II the learned Judge expressed an opinion adverse to the grounds on which the plaintiffs then relied, and he no doubt came to the conclusion that those grounds were not well founded. That does not make the plaintiffs "the party against whom an order was passed under Ss. 280, 281 or 282" for as I have said the order was that the attachment should be raised. The order in Exhibit II must on the face of it be construed as one joint order dealing with the two petitions for the attachment being raised. It cannot be

1. (1905) I. L. R. 29 M. 225.

construed on the basis of its being three orders. It may be conceded that if the Judge had in fact desired to pass three distinct orders, one on the contention of each of the two petitioners, and a third on the contention of the then 4th defendant in that case the order he would have passed on the plaintiffs' petition would have been against their claims. The contention on behalf of the defendants is that the interpretation of Exhibit II to which I have first referred is not correct. In this connection certain proceedings in the High Court of a later date are relied upon by the respondent. These proceedings were considered irrelevant by the Lower Court but have been admitted by the consent of both sides before us. These proceedings, it is argued, preclude us from putting on Exhibit II the interpretation which I have just stated; alternatively it is said that other Judges of this Court have already interpreted Exhibit II with reference to points now arising and that we ought not to take a different view. Before I can deal with this argument, it will be necessary to state somewhat fully the facts out of which the present appeal arises. I shall as far as possible speak of the plaintiffs and defendants meaning thereby the present plaintiffs and the present defendants irrespective of their designation in the previous proceedings.

The property in question belonged to four families, from whom the plaintiffs or their predecessors in title (to all of whom I shall refer as the plaintiffs) claim to have purchased under the sale deed dated 27th July 1901. The first and second defendant obtained a decree, it is alleged, against Narasa Reddy representing one of the four families to whom the property, according to the plaintiffs orginally belonged. In execution of that decree the property was attached in April 1903 ; and the plaintiffs then put in a claim petition M. P. No. 451 objecting to that attachment and claiming that the property belonged to them and not to the judgment debtor. There was another petition M. P. No. 440 by persons claiming to be the mortgagees of the property and claiming that the attachment should be subject to their mortgage claims. Both those petitions were dealt with at the same time by the District Judge in Exhibit II. At the hearing of those petitions one Ragava Reddy also objected to the attachment. He belonged to and apparently represented the other of the four families, and claimed that the attachment should be raised, because the property was joint family property

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and previous to the attachment it had by the law of survivorship passed out of the ownership of the judgment debtor (then deceased) and devolved upon himself. This contention was accepted by the learned District Judge who disposed of the claim in Exhibit II. But from Exhibit II it also appears as I have already had occasion to say, that the plaintiffs did not in the opinion of the learned judge make out their claim to be considered as the *bona-fide* purchasers of the property attached. In the order, the opinion was also expressed on the other hand that the other petitioners were entitled to rely upon the mortgage put forward by them. In the result he passed one order, namely, that the attachment should be raised. Against that order an appeal was taken to the High Court being appeal against order No. 3 of 1904. To that appeal neither of the two petitioners were parties, the learned Judges (*Davies and Sankaran Nair, JJ.*) after stating that fact said that the order raising the attachment was set aside "so far as the 4th defendant was concerned." This order cannot, therefore, be said to affect the rights of the present plaintiff as they stood prior to the appeal. If I am right, therefore, in holding that the order under Exhibit II must be considered to be one joint order to the effect that the attachment should be raised, then that order, so far as the plaintiffs are concerned, was not affected by judgment in appeal against order No. 3 of 1904. That judgment is dated the 4th October 1904. After that judgment the execution was proceeded with. There was an application for a warrant of sale in pursuance of which finally the property was sold on the 5th of October 1909. But in the meantime the plaintiffs put in a petition M. P. No. 441 of 1906 applying that the sale should be stopped. They relied upon Exhibit II which, they claimed, was final and conclusive as regards their rights, because the defendants had not within a year thereof instituted a suit for setting aside the order raising the attachment. This contention of the plaintiffs was, on the 18th of July 1906, accepted by the then District Judge and he decided that the defendants' application for sale must be dismissed. In other words he held that the sale could not be proceeded with. Against that order of the District Judge Civil Revision Petition No. 549 of 1906 was put in. The petition was dealt with in the first instance by Mr. *Justice Wallis* on the 12th February 1908. According to Mr. *Justice Wallis's* view Exhibit II ought to be construed as three orders and it

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ought to be construed as including an order that the present plaintiffs had no claim to the property; in other words that they were parties against whom such an order was passed as is referred to in S. 283 of the Civil Procedure Code. The logical result of Mr. *Justice Wallis's* interpretation of Exhibit II would be not only (1) that the sale could not then have been stopped by the plaintiffs but (2) it might also imply that the plaintiffs' rights, if any, in the property were lost by the fact that they had not instituted a suit within a year of Exhibit II. If that interpretation of Exhibit II is correct and if both the results to which I have referred must follow from that interpretation, then of course the plaintiffs must fail in their present suit. Even on *Wallis J's* construction of Exhibit II Mr. S. Sreenivasa Aiyengar argues that the suit is not barred. For reasons which I shall indicate later, it is unnecessary in my view to deal with that construction of Exhibit II and with Mr. S. Sreenivasa Aiyengar's argument on this basis. There was an appeal from Mr. Justice *Wallis's* judgment and in that appeal Mr. *Justice Miller and Mr. Justice Pinhey* decided on the 7th September 1908 that the question whether or not the plaintiffs had lost their right to establish their claim to the property by a suit by their having failed to do so within a year of Exhibit II was a question which it was unnecessary to decide in those proceedings. They held further that the defendants were not bound to institute a suit within a year of Exhibit II. On that point and so far as the further defendant in those proceedings were concerned, it seems to me that there could not be any question that the sale could proceed after the judgment of *Davies and Sankaran Nair JJ.* allowing the appeal and permitting the sale to be proceeded with. However that be, the question whether the plaintiffs were barred from putting forward a claim on the basis of the sale deed to them dated the 27th of July 1901 was expressly not decided by the Court of appeal, and it is clear that the question was not before them which we have to decide, *viz.*, whether it was for the plaintiffs to institute a suit under S. 283 of the Civil Procedure Code within a year after Exhibit II. All they had to consider was whether it was for the defendants to institute a suit. It is true that they agree with *Wallis J's* view that the effect of Exhibit II was to disallow the claim of the plaintiffs. But that view was expressed

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in considering whether the effect of Exhibit II was to necessitate a suit by the defendants under S. 283. On the other hand they expressly refer to the question whether the plaintiffs should put in a claim petition in the sale proceedings and decline to consider the appeal as such a claim. There is no doubt that the question is complicated by the fact that Exhibit II was one joint order dealing really with three claims, and by the further fact that in the appeal to the High Court against that order the plaintiffs were not parties and yet the order was reversed. Though the plaintiffs were interested in having it confirmed, yet the order was reversed and the plaintiffs were not bound by the reversal as their rights would not be affected by proceedings to which they were not parties.

Before considering whether owing to these proceedings I ought to take a view different from that which I have expressed as appearing to me to be the *prima facie* interpretation of Exhibit II or whether the effect of Exhibit II was modified by any of the proceedings to which I have referred, I think it necessary to consider some of the decisions to which we have been referred.

The general principle underlying those decisions, as I understand it, seems to be governed by the fact that the proceedings under S. 278 and the following sections which are referred to in S. 283 are primarily for the purpose of dealing with attachments in execution proceedings.

In so far as any decision on the claims of parties other than the judgment-debtor is necessary for the continuance of the execution proceedings, that decision has to be promptly given by the authorities entrusted with the execution proceedings in the exercise rather of administrative than judicial function; and in so far as on their decision the execution proceedings are carried out, the parties who are affected by their decision have a short period of limitation within which that decision can be contested. The decisions during the course of the execution are necessary for the execution proceedings being carried through and it is necessary that such proceedings shall not be delayed, nor their effect kept in suspense, after they have been acted upon. If, however, for any reason the execution proceedings are not pursued to their end, and if the parties are, owing to the arrest of such proceedings, left in the same state in which they were prior to the

attachment, then the whole of the proceedings arising out of the attachment and the claim petition are, so to say wiped out, and the petitioner is not concerned with what may have been incidentally held with a view to that being effected which ultimately was not given effect to though it may be cessation of the attachment and the execution proceedings following it was not brought about by circumstances controlled by the unsuccessful claimants.

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This seems to me to be the principle on which *Ibrahim bhai* v. *Kabulabhai* [1] *Gopal Purushotam* v. *Bai Divali* [2] *Krishna-Prasad Roy* v. *Bipin Behary Roy* [3] *and Kidarnath* v. *Rakhaldas* [4] were decided. Thus in *Ibrahimbhai* v. *Kabulabhai* [1] the attachment was withdrawn though on the application not of the claimant but of another person, and it was held that the attachment being withdrawn it was unnecessary for the plaintiff to institute a suit: as the object of the suit would have been to get the property released from attachment and that object had already been effected though through the agency of other parties. That decision was followed in *Gopal Purshotham* v. *Bai Divali* [2] and it was there laid down that the withdrawal of the attachment replaced the parties in *status quo ante*. The principle on which the case of *Umesh Chunder Roy* v. *Raj Bullubh Sen* [5] proceeded seems to me to have been the same. In that case it is stated at page 281; "But it appears that no sale was held, because the judgment-debtor paid off the amount of the decree. The effect of that was that the attachment ceased: and any right which the plaintiff's mother acquired by purchase even though pending the attachment became valid, and nothing having accued to injure her right, if any, she had no occasion to bring any suit. The judge of the Court below says that the fact that the decree in execution of which the property was attached was paid off by the judgment-debtor makes no difference whatever. In this view we think that he is mistaken. The payment by the judgment debtor of the decretal amount did away with the necessity for a sale and the attachment being withdrawn the purchased right of the plaintiff's mother stood good. See also *Kidarnath* v. *Rakhal Das* [4].

1. (1888) I.L.R. 13 B. 72. 2. (1893) I.L.R. 18 B. 241.
3. (1903) I L.R. 31 C. 228. 4. (1888) I.L.R. 15 C. 674.
5. (1882) I. L. R. 8 C. 279.

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In this connection I think it necessary to deal with a remark in *Koyyana Chittena* v. *Doosy Gavaramma* [1] which may seem to be inconsistent with the principle that I consider to underlie the decisions. There in dealing with an argument, which the Court did not accept it was said at page 228: "The argument was that the decree having been eventually satisfied there was no reason for the plaintiffs to bring a suit, and the fact that it was not satisfied until after expiration of a year from the date of order was immaterial. The contention was that the order was only conclusive against the plaintiffs, if they failed to bring a suit so as to bar them from denying the right of the judgment-creditor to sell the land which he had attached and the right of a purchaser claiming under a sale in execution proceedings." And then later on at page 229 the court deals with this contention in the following terms; "We are of opinion, however, that the payment off not having been made within a year after the date of the order, the order is conclusive as between the claimants (plantiffs) and the defendants. To hold otherwise would lead to uncertainty of title and would be inconsistent with the policy of the legislature in prescribing a short period of limitation for suits by parties against whom an order has been made in claim proceedings. To hold that the right of the unsuccessful claimant to bring a suit remains a state of suspended animation for an indefinite period after the expiration of a year from the date of the order aginst him, liable to be revived at any moment by the payment off of the amount of the decree, would lead to great inconvenience. On the facts of the case we are of opinion that the order under S. 283 was conclusive as between the plaintiffs and the defendants, and the order of the lower Appellate Court cannot be supported on the ground that it was not."

There, no doubt, it was held that, if a claim petition is decided against the petitioner and that decision is not questioned by a suit instituted within a year, then the petitioner's right to the property is barred notwithstanding that as a matter of fact the attachment may not be proceeded with. But in that case there was a decision directly against the claimant and the decision was that the attachment should continue and that the execution should proceed. In this state of circumstances it may well have seemed to the court that it is not permitted to the

1. (1906) I. L R 29 M. 225.

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unsuccessful claimant to wait and see whether the execution is proceeded with: nor is the one year's period of limitation necessarily made subject to active steps being taken for proceeding with the execution by sale of the property or otherwise; and that on the other hand the attaching creditor and the other parties concerned may well think that the decision will not be questioned by the unsuccessful claimant after the lapse of a year following the decision that the claimant had no right to intervene and that the execution proceedings may continue irrespective of any hindrance on the part of the unsuccessful claimant. I need only say with regard to this decision that the main fact on which it proceeds namely, a decision in the claim petition that the execution may proceed irrespective of the petitioner's alleged claim does not exist in the present case. I do not think on the other hand that it was intended that the principle on which the cases to which I have referred were decided should be disregarded. On the contrary those cases were carefully considered and distinguished; and if I am right in extracting the principle that I have extracted from those cases, then it seems to me that the case of *Kovanna Chittenna* v. *Doosy Gavaramma* [1] does not apply to the circumstances with which we have to deal under Exhibit II in so far as the present question is concerned.

For these reasons I consider that on principle no less than on the construction of Exhibit II it ought to be held that after execution proceedings were arrested by that order, those parties who were instrumental in getting the proceedings arrested, were not bound by reason of any opinion expressed in Exhibit II to institute a suit for the purpose of contesting the correctness of that opinion. I am also of opinion that the judgments of Davies and Sankaran Nair JJ. and of Miller and Pinhey, JJ. do not affect the position of the plaintiffs as regards the present suit. There being no order against the plaintiff in Exhibit II the suit is not barred, and it must be remanded to the lower Court, for being disposed of on the merits in accordance with law. The costs will be costs in the cause.

Spencer, J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

Subba Naidu and another ... *Appellants* Defendants.*

v.

Venkatrama Naidu and another *Respondens (Plaintiff and 3rd Defendant)*

Subba Naidu v. Venkatrama Naidu.

Hindu Law—Self—acquisition—Substantial nucleus—Burden of proof—Incurable tumour on the nose—Not a disqualification from inheriting.

Where there is a substantial nucleus of ancestral property, the burden is on the party asserting self-acquisition to prove it.

An incurable tumour in the nasal cavity and on the nose is not a disease which disqualifies a person from inheriting under the Hindu law. *Venkatasubba Rao* v. *Purushottam* (1), *Kayarohana Patkan* v. *Subbaraya Thevan* (2), referred to

Second appeal from the decree of the District Court of Tinnevelly in A. S. No. 74 of 1911 preferred against the decree of the Cout of the District Munsif of Tinnevelly in O. S. No 690 of 1909.

M. D. Deva Doss for Appellant.

C. Narasimha Chariar for *S. V. Padmanatha Aiyangar* for Respondents.

The Court delivered the following

Judgment:—The only questions in this second appeal are—

1. Whether the learned District Judge fell into any error of law in finding on the evidence that the plaint lands were joint family properties in the hands of the plaintiff's father and not his self-acquired separate property

2. Whether the plaintiff is disqualified from inheritance under the Hindu law and whether the District Judge's omission to give a finding on this point necessitates a remand. As regards the 1st question, the finding of both courts is that there was a substantial nucleus of ancestral funds. In such a case (See Mayne paragraph 291) that is "where there is a substantial nucleus of family property of which the father was the manager the onus would lie on those who assert that any property afterwards acquired in the name of the father was acquired without detriment to that property and was his self-acquisition." The lower Courts have found that the defendants (appellants), failed to discharge that burden and we think they were right.

* S. A. 1848 of 1912. 11th March 1914.

1. (1902) I. L.R. 26 M. 133. 2. (1913) 25 M. L. J. 251.

Subba Naidu v. Venkatrama Naidu.

As regards the question of plaintiff's alleged disqualification we have very little doubt that the learned District Judge's omission to refer to it in his judgment was because the defendants (appellants before him) did not argue it in the District Court and practically gave up that contention. If it was necessary to go into that question, we don't think we shall come to a different conclusion from the District Munsif who held that plaintiff's disease relied on as a disqualification was not congenital. Even if it was congenital the nature of the disease (a tumour in the nasal cavity and on the nose) is not one of the diseases which disqualifies a person from inheritance (See Mayne paragraph 596) but only such congenital disqualifications as blindness, dumbness etc.; whether some of these texts as to disqualifications are in orce now-a-days has been doubted in *Venkata Subba Row* v. *Purushotham* [1] and *Kayarohana Pathan* v. *Subbaraya Thevar and another* [2]

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

Alagappa Chettiar — *Appellant** (*Plaintiff.*)

v.

Subramania Pandia Thevar and others. — *Respondents.*

Alagappa Chettiar v. Subramania Pandia Thevar.

Limitation Act, s 20—Mortgagee directed to pay creditor of mortgagor in full—No authority to make payment of interest as such—To constitute agency under—Not necessary that exercise of authority must be obligatory.

A mortgagee who is required under his mortgage document to pay a portion of the consideration to a creditor, of the mortgagor in discharge of the amount due to him, principal and interest is not an agent authorised to make payment of interest as such so as to keep alive the debt, his authority being only to pay off the debt in full.

To constitute a person an authorised agent within the meaning of the section, it is not necessary that the exercise of the authority should be obligatory; it is sufficient even if the exercise is optional.

Appeal from the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No 14 of 1908.

C. Krishnamá Chariar for Mr. *K. Srinivasa Aiyangar* for Appellant.

S. Srinivasa Aiyangar for Respondent.

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1. (1902) I. L. R. 26 M. 133.
2. (1913) 25 M. L. J. 251.

*A. No. 218 of 1909. 31st March 1914.

Alagappa Chettiar v. Subramania Pandia Thevar.

The suit is to recover the balance of interest and principal due on a registered debt bond executed by defendants 1 and 2 in favour of the plaintiff's assignors on the 17th March 1897. The suit was instituted on the 23rd March 1908. On the 14th August 1901 defendants 1 and 2 and their mother executed a mortgage of their properties to the 3rd defendant for Rs. 26,000. A portion of the sum of Rs. 26,000 *viz.* Rs. 10,920 is stated to be received in the mortgage deed as follows :—"Nos. 2 and 3 of us (defendants 1 and 2) have executed 2 registered bonds on 14th December 1896 and 17th March 1897 for Rs. 2,000 and Rs. 4000 respectively in favour of the plaintiff's assignees. "The sum received by us in the matter of our having given you premission to pay off and obtain return of the same is Rs. 10,920." In pursuance of this, the 3rd defendant's agent paid sum of Rs. 4,170 towards the interest of the suit bond and had it endorsed on the bond. The plaintiff relied on this payment of interest as a payment of interest within the meaning of S. 20 of the Limitation Act. The Subodinate Judge dismissed the suit as barred by limitation. The plaintiff appealed to the High Court.

C. Krishnamachariar for *K. Srinivasa Iyengar* for the Appellant.

The 3rd defendant comes within the class of persons mentioned in S. 20 (1). He is the agent of defendants 1 and 2 duly authorised to pay interest. The mortgage deed authories him to pay off the amount of the plaintiff's debt, and payment of interest by him saves limitation.

S. Srinivasa Aiyengar for Respondents 1& 2.

The object of the mortgage deed is to discharge the suit debt; in other words to wipe off the debt by paying the full amount due. It is not an authority for the payment of interest. " In this behalf" in the section means for the purpose of paying interest as such. In *Lindsell* v. *Bonser* [1] there was an authorisation to discharge the debt; and a part-payment by the agent was held to be not contemplated by the authorisation and insufficient to keep alive the debt. See also *Harding* v. *Edgecumb* [2].

C. Krishnamachariar, replied.

The Court delivered the following

1. 2 Bing N C. 241. 2. (1859) 28 L. J. Ex. 318.

Alagappa Chettiar v. Subramania Pandia Thevar

Judgment:—In this case the defendants Nos. 1 and 2 executed a mortgage in favor of the 3rd defendant for Rs. 26000. Part of the consideration was made up of Rs. 10,920 to be paid by the mortgagee to the assignors of the present plaintiff on two bonds. The mortgagee did not pay the Rs. 10 920, but nearly two years later paid the interest due on the plaint up to that date and made no further payment on the plaint bond. The words of the mortgage are, "The sum received by us in the matter of our having given you permission to pay off the said bond and obtain the return of the same is Rs. 10,920". The Subordinate Judge was of opinion that the mortgagee was not an agent authoirzed to make any payment for the mortgagors because in his opinion it was optional for him to do so. Even if it was optional and not obligatory, still he could none the less be authorised to pay. The question, however, arises whether nearly two years after the date of the mortgage he was authorised to pay the interest on the bond up to that date so as to keep alive the mortgagors, liability to their creditor. We think that though the mortgagee had authority to pay off the debt in full he had no authority to make a pure payment of interest as such so as to bring the case within S. 20 of the Indian Limitation Act. We think that in this case, as in *Lidsall* v. *Bonser* [1] the agent exceeded his authority.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

Present:—Mr. Justice Wallis, Mr. Justice Sadasiva Aiyar, and Mr. Justice Spencer.

The Public Prosecutor — *Appellant* in both.*

v.

Raver Unithiri, Marvather Vittil — *Respondent (accused) in Criminal Appeal* No. 50 of 1914.

v.

Ambumarar — *Respondent (accused) in Cr. A.* No. 51 of 1914.

Public Prosecutor v. Raver Unithiri.

Criminal Procedure Code, s. 195 Cl. (6)—Sanction—Appellate Court's order confirming the grant of—Six month's time to be calculated from the date of the appellate Court's order—Sanction by District Magistrate—Appeal to High Court—Legality of the order confirming sanction—Cannot be questioned—Cr. Pr. Code s. 537 Cl. (b).

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*C. A. No. 50 and 51 of 1914. 16th April 1914.

1. 2 Bing. N. C. 241.

Public Prosecutor v. Raver Unithiri.

Confirmation by the appellate Court of sanction granted by the lower court amounts under the authorities to a fresh grant of sanction by the appellate court and as such the six months' time allowed under s. 195 Cl. (6) for presenting the complaint ought to be calculated from the date of the appellate Court's order and not from the date of the lower court's order.

Where sanction was granted by the District Magistrate and the sanction was confirmed by the High Court on appeal.

Held that though the proper appellate authority was the Sessions Judge, the High Court having confirmed the sanction, the legality of the said order could not be questioned and the six month's time should be calculated from the date of that order.

Per Sadasiva Aiyar J Obiter. In view of s. 537 Cl. (b), the judgment in *Chinna Karuppa Goundan* v. *Muthu Goundan* (1) requires reconsideration.

Appeal under Section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Sessions Judge of North Malabar in Criminal Appeals Nos. 33 and 34 of 1913 on his file.

Public Prosecutor (*C. F. Napier*) for Government.

V. Ryru Nambiar for Accused in Cr. A. No. 50 of 1914.

K. Govindamarar for accused in Cr.A. No. 51 of 1914.

The Court delivered the following:—

Judgment Wallis J:—These are appeals from acquittal by the Sessions Judge setting aside the conviction of the accused on the ground the complaint was not filed within six months from the grant of sanction in the first instance as required by S. 195 of the Criminal Procedure Code. It is argued by the Public Prosecutor that the terms of the section as interpreted by the decisions of two Full Benches of this Court, *Muthuswami Mudali* v. *Veeni Chetti* [2] *Babu* alias *Adimulam Pillai* v. *Babu* alias *Krishnayan* [3] were sufficiently complied with as the complaint was filed within six months of the order of the High Court confirming the sanction. It has been held in these decisiions that the confirmation or revocation of a sanction by the appellate authority pursuant to the sub-section is a fresh giving. or refusing of sanction within the meaning of the sub-section so as to give the Court to which the Appellate Court is subordinate, jurisdiction to entertain an appeal from such order. This point was expressly raised in the recent case in (1902) 2 Weir 202 and was decided by 5 Judges in the affirmative. If this be correct—and it is our duty to bow to it whatever our own views may have been, it seems difficult to give the word "given" in the further

1. (1902) 2 Weir 202
2. (1907) I. L. R. 30 Mad. 382.
3. (1912) 22 M. L. J. 419 F. B. 11. M. L. T. page 361=(1912) M. W. N. 499.

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Wallis J.

portion of the section which provides that no sanction shall remain in force for more than six months from the date on which it was given a different meaning, and to hold that it refers to the grant of sanction in the first instance. We are therefore constrained to hold that the complaint was filed in time.

It is unnecessary to consider whether the Judgment of the Appellate Court should not also be set aside as contravening the express provisions of section 537 (*b*). The respondents' vakil has not taken the objection that the High Court in this case was not the proper court to entertain the appeal from the Additional District Magistrate's order; and we do not think we are at liberty to go behind the Order of the High Court confirming the sanction.

In the result the Judgment of the Appellate Court acquitting the accused is set aside and the Sessions Judge is directed to take the cases again on his file and dispose of them according to law.

Spencer J:—I concur,

Sadasiva Iyer J:—I take it that in these cases, the High Court confirmed the sanction granted by the Additional District Magistrate acting under S. 195 Criminal Procedure Code as the authority to which the District Magistrate was subordinate and not under S. 439 Criminal Procedure Code. They could not have acted in revision under S. 439 Criminal Procedure Code. as the Full Bench decision of *Audimulam Pillai* v. *Krishnayan* [1] says that interference with an order granting or refusing sanction is not in the exercise of Appellate or Revisional jurisdiction.

It may be that the High Court in acting under S. 195 Criminal Procedure Code in this present case overlooked the fact that the application under S. 195 should have been made to the Sessions Judge as the authority to which the District Magistrate was subordinate (see clause 7 of section 195) and not to the High Court, skipping the Sessions Court. However, the High Courts's decision is final as between the parties.

It has been finally decided by the above Full Bench decision that the word "given" in the first portion of clause (*b*) of S. 195 includes the meaning "confirmed by a Superior

1. (1912) 212 M. L. J. 419 (F. B.) So. 1912 M. W N. 499;

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Sadasiva Aiyar J.

Court." I do not think that in construing the same word "given" in another part of the same clause (*b*) which relates to the period of six months for which the sanction "given" is to be in force, it is advisable to place a different construction.

The Sessions Judge's order acquitting the respondents on the ground that the sanction "given" had expired must be set aside as there was a sanction "given" in this case by the High Court within six months before the charge though the sanction given by the Magistrate expired more than six months before the charge.

The Sessions Judge's order being thus set aside, the next question is whether to deal with the merits of the case ourselves or direct the Sessions Judge to rehear the appeals before him. Whether such a direction is competent to an appellate Court acting under S. 423 clause (*a*) *or* not, it is competent to to the High Court acting under S. 439 read with clauses (*a*), (*c*) and (*d*) of S. 423.

I think that the decision in ***Chinnakaruppa Goundan* v. *Muthu Goundan*** 1 which seems to be against the express provision of S. 537 clause (*b*) requires reconsiderati on but the question has not been raised in the appeal grounds in these cases and it is unnecessary to rely on S. 537 (*b*) in support of our order reversing the Appellate Court's order.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Seshagiri Aiyar.

Rangappa ... *Appellant* * (*Plaintiff*).

v.

Thammayappa (died), and others. ... *Respondents* (*Defendants*).

Rangappa v. Tammayappa

Mortgage—Construction—Personal covenant—Transfer of Property Act, Ss. 68, 100—Charge—Holder not entitled to sue for sale or for personal, decree when no personal covenant—Simple mortgage—Personal covenant, essential.

Where under a document which called itself a mortgage, plaintiff was put in possession of one item of property and he was given a charge over two other items with a clause in the end "Whenever we pay the same (money) to you you shall receive it and give back the deed".

Held; *Per Sadasiva Aiyar J:* That on a proper construction of the document there was no personal covenant in favour of the plaintiff and in the absence of such a covenant, the document could be construed only as conferring a usufructuary

1. (1902) 2 Weir 202.

* S. A. No. 1464 of 1909. 5th March 1914.

mortgage interest over one item and a charge over the other two items which would not entitle the plaintiff to sue for the recovery of the money either personally or by sale of the items charged.

Per Sheshagiri Aiyar J. (contra). That there was a personal covenant in favour of the plaintiff and that the document was in respect of the other two items a simple mortgage but the suit being based on a false allegation of dispossession by the mortgagor it was not a case in which a decree should be given on an altered footing.

Second Appeal from the Decree of the Court of the Subordinate Judge of Bellary in Appeal Suit No. 245 of 1906 preferred against the decree of the Court of the District Munsif of Penukonda in O. S. No. 77 of 1906.

M. D. Deva Doss W. Lubech for Appellant.

D. R. Swaminadhan for Respondent.

The Court delivered the following.

Judgments :—*Sadasiva Aiyar, J* :—The plaintiff is the appellant in this case. He brought the suit out of which this Second Appeal has arisen for the recovery of the amount due under a document dated the 30th of June 1900 executed by defendants 1 and 2. The Lower Appellate Court dismissed the plaintiff's suit on the finding that in accordance with the terms of the above document, the plaintiff was put in possession of one of the three lands mentioned in the document as security for the amount mentioned in the same, and that according to the terms of the bond and the law applicable to the case, the plaintiff was not entitled either to bring a suit for sale of the properties charged for the amount due under the plaint bond, or to obtain a personal decree against the executants. It is often very difficult in some of these cases to decide what the nature of the document sued on is.

So far as the plaint document affects that property which was intended to be and was put in the possession of the plaintiff, it seems to me reasonably clear that the document is a document of usufructuary mortgage. As regards the other two lands mentioned in the document the quesion is whether the document is a document creating a simple mortgage over those two lands or whether the document merely creates a charge upon the two lands. *In Balasubra mania Nadar* v. *Sivaguru asari* [1] Mr. Justice *Krishnaswami* Aiyar says as follows in pages 568, 569 " I have

1. (1909) 21 M. L. J. 562.

Rangappa v. Thamayappa. — Sadasiva Aiyar, J.

been in considerable doubt during the course of the argument as to whether we have succeeded in getting hold of any principle by means of which we could distinguish a mortgage from a charge. Having heard the matter fully discussed by Mr. Srinivasa Aiyangar, I have been able to make up my mind and I wish to express the conclusion at which I have arrived. *I think a covenant to pay is an essential element of a simple mortgage.*" In this case I do not think that I could gather from any of the words used in the plaint document that the defendants 1 and 2 covenanted to pay the amount mentioned in the bond executed in favour of the plaintiff. The language of the document to be construed in this case seems to me even less favourable to the plaintiff than it was in the case of *Gopalasami* v. *Arunachella* [1] where it was held that there was no covenant to pay the mortgage money by the mortgagor. If there is no such covenant in the plaint document, then the document, so far as the other properties are concerned created only a charge on those properties and did not give a simple mortgagee's right to plaintiff over those properties. If there is only a charge, then S 100 of the Transfer of Property Act applies. That Section says that "all the provisions as to a mortgagee instituting a suit for the sale of the mortgaged property shall so far as may be apply to the person having a charge." Some of those provisions governing the questions relating to the institution of a suit by a mortgagee are contained in S. 68 of the Transfer of Property Act. That section says that "the mortgagee has a right to sue the mortgagor for the mortgage money in the following cases only" and then there follow three clauses (*a*), (*b*) and (*c*), clause (*c*) consisting of two paragraphs. In this case, the plaintiff has not proved any facts bringing his case within any of these three clauses and he was therefore not entitled on the date of the suit to sue for the recovery of the mortgage money from defendants 1 and 2 personally or by the sale of the property charged. I therefore confirm the decree of the lower appellate Court and dismiss the second appeal with costs.

Seshagiri Aiyar J:—I am not prepared to differ. Speaking for myself I am inclined to think that there is a covenant to pay when the mortgagors say "whenever we pay the same to you, you shall receive it and give back the deed," I am prepared to hold that there was an understanding on the part of the

1. (1892) I. L. R. 15 M. 304.

Rangappa v. Thamayappa, Seshagiri Aiyar, J.

mortgagors to pay the amount. The nonfixing of a period for payment does not make it the less a covenant to pay. But this Court in *Gopalasami* v. *Arunachella* [1] held that such an undertaking does not amount to a covenant to pay. With the greatest deference to the learned judges I think the question requires re-consideration. I must also differ with considerable hesitation from the opinion at which my learned colleague has arrived, that there is only a charge created in respect of the other two items. The document itself says that a mortgage is being executed and there is nothing in the body of the document which indicates that the parties had in mind only a charge, especially having regard to the fact that on four previous occasions there was undoubtedly a simple mortgage with respect to these properties. But the plaintiff came into court with a false case. He said that he was deprived of possession by the defendants and it is found that he is still in possession. That was the cause of action and I am not prepared to stretch a point in his favour and to allow him to base his suit upon the language of the document which, in my opinion does contain a covenant to pay. That may necessitate a reference to a Full Bench whether *Gopalsawmi* v. *Arunachella* was rightly decided. I therefore do not differ from the conclusion at which my learned colleague has arrived, and the second appeal will be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair, and Mr. Justice Ayling.

Muthusami Chetty — *Appellant* *(Respondent)*.

v.

Chinnammal — *Respondent (Petitioner)*.

Muthusami Chetty v. Chinnammal.

Hindu Law—Survivorship—Attachment before judgment—Decree following—Precludes accrual of title by.

An attachment before judgment followed by decree precludes the accrual of title by survivorship as against the attaching creditor.

Ramayya v. *Rangappayya* 2 *distinguished. Krishna Rau* v. *Lakshamana Shanbhogue* 3 *applied.*

Appeal from the order of the District Court of Chingleput in A. S. No. 483 of 1911, preferred against the order of the Court

* A. A. A. No. 113 of 1912. 9th February 1914.

1. (1892) I. L. R. 15 M. 304. (1893) 2. I. L. R. 17 M. 144.

3. (1879) I. L. R. 4 M. 302.

Muthusami Chetty v. Chinnammal.

of the District Munsif of Tiruvellore in M. P. No. 255 of 1911 (in O. S. No. 641 of 1899).

T. R. Ramachendra Aiyar and *T. R. Krishnasami Aiyar* for Appellant.

B. Govindan Nambiar for Respondent.

The Court delivered the following

Judgment:—It has been repeatedly decided by this Court, that attachment alone without an order for sale precludes the accrual of the title by survivorship in the event of the death of the judgment-debtor after attachment and before the order for sale *B. Krishna Rau* v. *Laksmana Shanbhogue.* [1] It is true that an attachment before Judgment has been declared not to have that effect in the event of the judgment debtor dying before decree *Ramayya* v. *Rangappayya*, [2]. The reason is that the attachment before Judgment is only intended to protect the property from alienation. But when a decree is passed subsequently it is unnecessary to attach the property again and the prior attachment renders the property available for sale in execution. An attachment followed by a decree therefore precludes the accrual of the title by survivorship for the same reasons as an attachment after decree. For these reasons we reverse the orders of the Courts below, direct the Munsif to restore the application to his file and pass fresh orders. The appellant is entitled to his costs in this and the Lower Appellate Court. The costs in the Court of First Instance will be provided for in the final order.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Seshagiri Aiyar.

Chamarti Suryaprakasarayudu — *Appellant** (*Plaintiff*).

v.

Arardhi Lakshminarasimha Charlu, and others. — *Respondents Defendants* 1, 2, 3 and 4.

Suryaprakasarayudu v. Lakshminarasimha.

Specific Performance—Specific Relief Act S, 22—Delay—Not ground for refusing—Waiver or abandonment mere delay not—Contract to pay after execution of sale deed by defendant—No breach or laches till execution of sale deed.

Delay by itself is not a ground for refusing to decree a suit for specific performance *Nawab Begam* v. *A. H. Creet* (1) distinguished.

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* S. A. No. 599 of 1911. 2nd March, 1914.

1. (1879) I. L. R. 4 M. 302 at p. 307. 2. (1893) I. L. R. 17 M. 144 at p. 146.

1. (1905) I. L. R. 27 All. 678.

It is an error of law to hold that mere delay apart from other facts or circumstances amounts to waiver or abandonment.

Where under a contract for sale the defendant agreed to execute sale deed in favour of the plaintiff within a month and then receive the purchase money.

Held that there could be no question of breach of contract or laches on the part of the plaintiff till the defendant executes the sale deed.

Second Appeal from the Decree of the Court of the Subordinate Judge of Kristna at Ellore in Appeal Suit No. 33 of 1910 preferred against the Decree of the Court of the Principal District Munsif of Thuuku in Original Suit No. 32 of 1908.

The Oourt delivered the following

V. Ramesam for Appellant.

P. Narayana Murti for Respondent.

Judgment :—*Sadasiva Aiyar J*:—Plaintiff is the appellant in this Second appeal. He brought the suit for specific performance of the agreement dated 4th November 1914, Exhibit A, executed in his favour by the 1st defendant.

Under Exhibit A, the 1st defendant agreed to execute a sale deed for Rs. 400 in favour of the plaintiff within a month and to receive Rs. 360 out of the Rs. 400 (purchase money) after so executing the sale-deed, the remaining Rs. 40 having been received by the 1st defendant in advance.

The suit was brought on 2nd December 1907 just within three years from the expiry of the one month's time fixed by the agreement for the execution of the sale deed by the 1st defendant. The learned District Munsif gave a decree in plaintiff's favour. The learned Subordinate Judge on appeal, reversed the Munsif's decision and dismissed the plaintiff's suit with costs on the following findings and reasonings :—

(*a*) though the plaintiff made more than one statement that he was always ready to pay the balance of Rs. 360 as soon as the 1st defendant executed the sale-deed the probabilities is that the plaintiff never had Rs. 360 ready in his hands to make such a payment.

(*b*) As the plaintiff delayed for nearly 3 years in bringing this suit for specific performance, he has been guilty of laches and hence the Court in its discretion ought to refuse the relief of specific performance prayed for by the plaintiff.

(*c*) Not only has the plaintiff been guilty of laches but the said negligence of the plaintiff itself amounts to a waiver or abandonment of his right under the contract on the part of the plaintiff and hence also the plaintiff's suit ought to be dismissed. I

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think that the Subordinate Judge's finding of fact that the plaintiff had not got Rs. 360 ready with him to be paid whenever the 1st defendant was ready with a properly executed document is based upon no legal evidence. The Subordinate Judge may be entitled to find on the evidence on the record that the plaintiff has not proved that he would have been ready with the money if the sale-deed had been executed and tendered to him, but he was not entitled to go further and say that the plaintiff was not ready with the money as there is no evidence on the record to show that the plaintiff had not enough money with him on any of the occasions when the 1st defendant or the prior mortgagee, P. W. 4 applied to the plaintiff for payment of money to the plaintiff's 4th witness. The plaintiff cannot be said to have broken his part of the contract evidenced by Exhibit A until the 1st defendant had performed 1st defendant's own part of the contract, namely the execution of a proper sale-deed. Then as regards the alleged laches on the part of the plaintiff, he cannot be legally charged with any laches in the performance of his part of the contract till the 1st defendant has performed his own part of the contract. As the Ist defendant did not execute the sale-deed within the one month's period which he himself fixed in Exhibit A for the execution by him of the sale-deed and had not executed it even till the date of the suit, there could have been no laches on the plaintiff's part in the performance of his part of the contract,

As regards the delay in bringing this suit for specific performance, the learned Subordinate Judge relies upon the case of *Nawab Begam* v. *A. H. Creet*[1] for the position that such delay in bringing the suit would itself justify the court in the exercise of its discretion to refuse relief in a suit for specific performance. In that case. however, the defendant ***had definitely refused*** to perform his part of the contract nearly 3 years before the suit was brought. In this case, the 1st defendant is not proved to have definitely refused to execute the sale-deed to plaintiff. In his registered notice Exhibit C. he merely asked the plaintiff to give effect to all the terms of the agreement, Exhibit A within a week from the date of that notice (which was dated the 6th January 1905). It is only if the plaintiff did not give effect to all the terms of Exhibit A within one week that the 1st

1. (1905) I. L. R. 27 A. 678.

defendant said in that notice that he will treat the agreement as at an end. The plaintiff replied to this notice by Exhibit C and he pointed out in that reply that he was always ready to perform all the terms of the agreement Exhibit A but that the 1st defendant had first to perform his part of the agreement, namely, the execution of the sale-deed and that, then, the plaintiff was ready and willing to perform his own part of the contract. As I said, the 1st defendant merely threatened to break the agreement if the plaintiff did not conform to the terms of the agreement. When the plaintiff sent his reply that he was ready to perform his part of the agreement, it cannot be said that under the terms of the notice Exhibit C, the 1st defendant must be deemed to have definitely broken the contract as soon as he received the plaintiff's reply. Further, having regard to the case in *Athikaruth Nanu Menon* v. *Erathanikat Komu Nayar* [1] *Kissen Gopal Sadaney* v. *Kally Prosonno Sett* [2] I am not satisfied that the decision in *Nawab Begam* v. *A. H. Creet* [3] has not been expressed in rather too wide and general language. The decision in that particular case might be justified on the facts of that case as the defendants in that case seems to have spent a considerable sum of money in improving the property after he had definitely broken the contract which breach had taken place nearly three years before the suit and the refusal of specific performance might be justified under Clause 2 of S 22 of the Specific Relief Act. The plaintiff brought his suit within two months of the sale made to 2nd defendant of the property to be sold to the plaintiff. I am therefore of opinion that there has been no such laches on the part of the plaintiff either in performing his part of the contract or in bringing the suit which could justify the court in the exercise of its judicial discretion in dismissing the suit for specific performance.

Then as regards the finding of the Subordinate Judge that the laches itself amounts to a waiver or abandonment. I think it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to a waiver or abandonment of the contract on the plaintiff's part. In this case there are no such circumstances proved. In the result, I

1. (1897) I. L. R. 21 M. 42. 2. (1905) I. L. R. 33 C. 633.
3. (1905) I. L. R. 27 A. 678.

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would reverse the decision of the Subordinate Judge and restore that of the Munsif. But I would make a slight modification in the decree of the District Munsif (as it is not in strict accordance with law.) The object of adding the 2nd defendant (subsequent purchaser with notice of the plaintiff's contract) as a party was to enforce specific performance of the plaintiff's contract as against him, he having become the legal owner of the property since date of the contract to sell the property made with the plaintiff. The conveyance in favour of the plaintiff as regards the plaint land ought therefore to be executed by him in order to convey the title to the plaintiff and the Munsif's decree which directs defendants 1, 3, and 4 to execute the sale-deed to plaintiff will be modified by substituting the direction that the 2nd defendant do execute the conveyance in the plaintiff's favour, within one month from the reopening of the Munsif's Court after the summer vacation. The Munsif's decree will stand in other respects. The defendants must pay the costs of the plaintiff in all courts.

Seshagiri Aiyar, J:—I agree with my learned brother's conclusion that the plaintiff was not at fault in performing his part of the agreement, and that the defendant ought to have executed the sale-deed before claiming the money. There is no allegation or proof in this case that the defendant had executed the document and called upon the plaintiff to pay the money, nor any suggestion that the defendant was willing to execute the document and that the plaintiff did not perform his part of the contract. Therefore I cannot accept the finding of the Subordinate Judge given under a misapprehension regarding the nature of the contract between the parties. The Subordinate Judge also comes to the conclusion that the delay in bringing the suit is fatal to specific performance being granted. Ever since the decision of *Lindsay Petroleum Co.*, v. *Hurd*[1] it has been the settled law that mere laches on the part of a person in bringing a suit for the specific performance will be no defence in law, and that has been followed in this Presidency in *Athikarth Nanu Menon* v. *Erathanikat Komu Nayar*[2]. *Kissen Gopal Sadaney* v. *Kalley Prosonno Sett*[3] accepts that principle. The same has been affirmed in *Peer Mahomed Dewji* v. *Mahomed Ibrahim*[4].

1. (1873) I. L. R. 5 P. C. 221.
2. (1897) I. L. R. 21. M. 42.
3. (1905) I. L. R. 33 C. 633.
4. (1904) I. L. R. 29 B. 234.

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There is nothing in the Specific Relief Act which says that laches in bringing a suit will by itself be a ground for refusing specific performance. The only section dealing with the discretion of the Court is S. 22 and under that section the discretion must be judicially exercised. A few illustrations are given which are intended to guide the courts in either granting or refusing relief. Laches is not one of the grounds mentioned as disentitling a party to a contract, to specific performance. Having regard to the fact that a special period of limitation has been fixed for bringing a suit for specific performance, I think the legislature has not intended that mere laches should be one of the grounds for refusing specific performance.

On these grounds I concur with my learned brother in his conclusion and in the decree which he has proposed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

Present :—Sir Charles Arnold White, Chief Justice, Mr. Justice Sankaran Nair, and Mr. Justice Oldfield.

Vathiadath Ahamad Kutti Haji's daughter and Kandar Madathil Assanar's wife Kochu Rabia — *Appellant** (*Plaintiff*).

v.

Vadakke Thalakkal Ahamad's son Abdurahman, and others — *Respondents.* (*Defts.* 11 *to* 19.)

Kochu Rabia v. Abdurahman.

Malabar Compensation for Tenants Improvements Act, (Madras Act I *of* 1886)—*Covenants entered prior to* 1886—*Effect of.*

A contract entered into prior to 1886 regulating the rates of compensation claimable by the tenant for improvements or providing for methods of fixing the amount of compensation due to him without expressly referring to his right to make improvements is not binding on the tenant if it is less favourable to him than Ss. 5 and 6 of the Act and the tenant is entitled to claim compensation according to the provisions of the Act.

Randupurayil Kunhisore v. *Neroth Kunhi Kunnan* (1) is not inconsistent with *Sreemanavikraman* v. *Ananda Pattar* (2) and *Paru Amma* v. *Mootheran* (3).

Second appeal from the decree of the District of Court South Malabar in A. S. No. 1115 of 1910, preferred against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in O.S. No. 38 of 1909.

1. (1908) I. L. R. 32 M. 1. 2. (1910) I. L. R. 34 M. 61. 3. (1912) 22 M. L. J. 221.

* S. A. No. 1414 of 1912. 23rd October 1913.

Kochu Babia v. Abdu-rahman.

This second appeal came on for hearing in the first Instance before (Sadasiva Aiyar and Tyabji, JJ.)who made the following.

ORDER OF REFERENCE TO A FULL BENCH †

The question involved in this appeal is whether S. 19 of the Malabar Compensation for tenants' Improvements Act (Madras Act I of 1900) affects the validity of an agreement which was entered into prior to the 1st January 1886 and by which agreement the parties agreed that compensation for improvements should be paid to the tenant on a certain basis or method of calculation. The District Judge differing from the Subordinate Judge hed that such an agreement though entered into before the 1st January 1886 was not binding on the tenant. The question turns upon the true construction of S. 19 of the Act which provides that "nothing in any contract made after the 1st day of January 1886 shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act". The District Judge followed *Kozhikot Sreemanavikraman* v. *Madathil Ananta Patter* [1] a decision of *Mr. Justice Benson* and *Mr. Justice Krishnaswami Aiyar*. That decision has been followed by *Mr. Justice Benson* and *Mr. Justice Sundara Aiyar* in *Paru Amma* v. *Moothoran* [2]

The reasoning of these two decisions (if we have understood it aright) is that section 19 contemplates only such agreements as limit the tenant's right to make improvements and to claim compensation therefor: that the section does not deal with a contract merely "regulating the rates of compensation" (see *Kozhikot Sreemanavikraman* v. *Madathil Ananta Patter* [1] or "limiting the amount of compensation to which the tenant is entitled" (see *Paru Amma* v. *Moothoran*[2] in respect of improvements made by him and that the tenant may claim compensation either according to such a contract or under Ss. 5 and 6 of the act whichever is more favourable to him *Kozhikot Sreemanavikraman* v. *Madathil Ananta Patter* [1]

It has been argued before us that these two decisions are inconsistent with the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan*[3] in which case the question

† 5th August 1918

1. (1910) I. L. R. 34 M. 61.

2. (1912) 22 M. L J. 221.

3. (1908) I. L. R. 32 M. 1.

Kochu Rat v. Abdurahman.

was whether improvements made after 1887 were to be governed by a deed of 1881 as regards the rate of compensation due to the tenant, and the court held (1) that the validity of contracts made prior to 1st January 1886 is not affected by S. 19 (whether the improvements were made before or after the 7th January 1887), and (2) that in the case of contracts made prior to the 1st January 1886, the rate of compensation is governed by the terms of the contract.

With the greatest respect to the learned Judges who decided the case of *Kozhikot Sreemanavikraman* v. *Medathil Ananta Patter* [1] and *Paru Amma* v, *Moothoran* [2] we have very serious doubts whether the decisions are in accordance with the true construction of section 19. or with the decision of the Full Bench in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [3].

Considering in the first place the language of section 19 itself, it seems somewhat hypercritical to hold that the words " the right of a tenant to make improvements and to claim compensation" do not include the right of the tenant to claim compensation under an agreement which does not expressly refer to his power to make improvements. It seems much more in accordance with the ordinary interpretation of words to construe the section as referring to contracts dealing with the rights of tenant both to make improvements and to claim compensation as well as with contracts having direct reference only to the claiming of compensation and being silent as to the right to make improvements: so that three classes of contracts dealt with in the section are: contracts to make improvements, contracts to claim compensation for improvements made and contracts to do both; there seems no reason to confine the applicability of the section to contracts which expressly mention both the right to make improvements and to claim compensation for them. It would seem that a right to claim compensation for improvements made implies a right to make the improvements for which compensation is to be claimed. In order that the Court may be justified in interpreting the section as rigidly as is done in the two decisions above referred to, it must be established that there is some very material distinction between contracts of the two kinds namely, (1) a contract which, as regards the rate of compensation

1. (1910) I. L. R. 34 M. 61. 2. (1912) 22 M. L. J. 221.
3. (1908) I. L. R. 32 M. 1.

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to be allowed to the tenant or as regards the method in which his improvements ought to be valued is less or more favourable to him than the rates and methods provided for in the Act, and (2) a contract which restricts or enlarges the right of the tenant to make improvements and to claim compensation for such improvements.

But it seems to us that in the majority of cases there would be great difficulty in distinguishing between the two classes of contracts and in determining whether a particular contract would fall under the one head or the other. This difficulty had to be dealt with in *Paru Amma* v. *Moothoran* [1] and can be illustrated by the facts in both the other cases which have been referred to above. If no substantial distinction can be generally drawn between the two classes of contracts, then the facts on which the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [2] was arrived at, must also be taken to be indistinguishable from the facts in the two later cases above cited in respect of the applicability of the provisions of S. 19, and it follows that the two later cases are inconsistent with the Full Bench decision.

The facts of the Full Bench case are set out in pages 1 and 2 of the report and the question referred to the Full Bench was worded quite generally thus:—In the case of a contract made prior to 1st January 1886, is *the rate of compensation which a tenant is entitled to receive* governed by the terms of the contract or by the provisions of the Malabar Compensation for Tenants' Improvements Acts of 1887 and 1900?" The answer to the reference is found in page 3 of the same:—" Our answer to the question which has been referred to us is that in the case of a contract made prior to 1st January 1886, the rate of compensation is governed by the terms of the contract."

The observations in *Kozhikot Srimanavikraman* v. *Madathil Ananta Patter* [3] that the tenant is entitled to fall back upon S. 5 of the act, if that is more favourable to him, as also the decision in *Paru Amma* v. *Moothoran*[1] seems to us to be directly in conflict with the answer of the Full Bench cited above. We might add that the observations on the question in dispute in *Kozhikot Sreemanavikraman* v. *Madathl Ananta Patter*[3] are *obiter*, as the case

1. (1912) 22 M. L. J. 221 2. (1908) I. L. R. 32 M. 1.
3. (1910) I. L. R. 34 M. 61

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was really decided on the point that an agreement by the tenant "to accept compensation for improvements *according to local custom*" is not a special contract within the meaning of section 19.

We feel, hower, that, as there are two reported decisions in favour of the view which, we find ourselves, as at present advised, unable to accept, it is desirable that the following questions should be referred to a Full Bench of this Court:—

1. "Whether a contract which is made prior to the 1st January 1886 and which regulates the rates of compensation claimable by the tenant for improvements or provides for methods of fixing the amount of compensation due to him (such rates or methods not being in accordance with the provisions in Ss. 5 and 6 of the said Malabar Compensation for Tenants' Improvements Act) but which does not expressly refer to the tenant's right to make improvements, is not binding on him if such a contract is less favourable to him than Ss. 5 and 6 of the Act, and whether the tenant is entitled to repudiate the contract and to claim compensation according to the provisions of the Act, and whether S. 19 of the Act affects such contracts."

2. "Whether the cases of *Kozhikot Sreemanavikraman* v. *Madathil Ananta Patter* [1] and *Paru Amma* v. *Moothoran* [2] have correctly interpreted the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan*[3]

Mr. K. Govinda Marar for the Appellant.

K. P. M. Menon for the Respondents.

The Court expressed the following

Opinion:—We are of opinion that the contract mentioned in the first question which has been referred to us is not binding on the tenant if it is less favourable to him than Ss. 5 and 6 of the Act, and that the tenant is entitled to claim compensation according to the provisions of the Act.

As regards the 2nd question, we are of opinion that, having regard to the question which the court had consider in *Randu purayil Kunhisore v. Neroth Kunhi Kannan* [3] there is no inconsistency between the Judgment in that case and the judgments in *Kozhikot Sreemanavikraman* v. *Madathil Ananta Patter* [1] and *Paru Amma* v. *Moothoran* [2]. We are not prepared to say that the two last mentioned cases were not rightly decided.

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1. (1910) I. L.R. 34 M, 61.
2. (1912) 22 M. L. J. 221.
3. (1908) I. L. R. 32 M. 1.

Ramalingam Pillai v. Muthayan.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Tyabji and Mr. Justice Spencer.

Ramalingam Pillai and others — *Appellants**

v.

Muthayyan, minor, by guardian Arunachalam Pillai and another — *Respondents.*

Hindu Law—Joint family—Sale—to raise funds for the defence of the head of the family—Criminal case—Binding nature of—Principles as to charges—applicable to sales.

A sale for the purpose of raising funds for the defence of the head of a joint Hindu family in a criminal case is for a necessary purpose and is binding against the other members of the family.

Beni Ram v *Man Singh* 1 *Suman Singh* v. *Liladhar* 2 followed.

The principles laid down in *Hanuman Persad Panday's* 3 case as to charges apply *mutatis mutandis* to sales.

Second appeal from the decree of the District Court of South Arcot in Appeal Suit No. 14 of 1910 preferred against the decree of the Court of the District Munsif of Chidambaram in Original Suit No. 823 of 1909.

T. Narasimha Aiyangar for Appellants.

S. Muthiah Mudaliar for Respondents.

Judgments:—*Tyabji, J*.—The plaintiff is a minor and claims in effect to have a conveyance, Exhibit I, set aside. Exhibit I is dated 20th August 1906. Under it, the plaintiff's father purported to convey the whole of certain ancestral property to defendants Nos. 2, 3, 4 and 5. At the date of Exhibit I, the plaintiff and the plaintiff's father were jointly interested in the property. The question whether or not Exhibit I is binding upon the plaintiff's share in the property depends upon whether the purpose for which it was executed is a purpose binding upon minor members of the joint family. That purpose was to raise funds for "the fees and other expenses" for the defence of the plaintiff's father against charges under the Indian Penal Code, S. 232 (counterfeiting the King's coin).

Beni Ram v. *Man Singh* 4 is relied upon for showing that the purpose above referred to is a legal necessity: it is argued that in that case the prosecution ended in a conviction and yet

* S. A. No. 299 of 1911. 6th April 1914.

1. (1911) I. L. R 34 All. 4.
2. (1911) I. L. R. 33 All. 472.
3. (1856) 6 M. I. A. 393.
4. (1911) I. L. R. 34 All. 4.

it was held that the expenses for defending the accused member of the family were a legal necessity: in the present case the plaintiff's father was acquitted. Had the plaintiff's father incurred debts for his defence in the criminal proceedings and had the creditors of the father proceeded against this property, then according to the decision in *Sumer Singh* v. *Liladhar*[1] the plaintiff's share in the property could have been sold in execution. When the question is as to whether there was legal necessity for a mortgage or sale, the following remarks of the Privy Council in *Hanuman Persad's case*[2] may have much relevance on the decision. It is obvious that money to be secured on any estate is likely to be obtained upon easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." Their Lordships were dealing with a mortgage but similar principles would apply with the necessary changes to a sale. The principle laid down in *Venkataramanayya Pantulu* v. *Venkataramana Doss Pantulu*[3] has no bearing on this case. What was considered was the distinction between antecedent debts and debts contracted concurrently with the sale or mortgage that is in question, whereas in the present case it is conceded by the appellants that there was no antecedent debt but the decision (it was argued) depends upon whether there was legal necessity for the sale of ancestral property. The Respondent's learned vakil met this argument by questioning whether the contention that the money was borrowed for a legal necessity was taken in the lower courts and submitted that it should not be permitted to be taken. The sixth paragraph of the plaint and the 3rd paragraph of the written statement of defendants Nos 2, 3, 4 and 5 refer to this point. They are in the following terms :—

Para 6 *of the plaint*. "The sale deed mentioned in the plaint was, it appears, executed for meeting the expenses of the crimi-

1. (1911) I. L. R. 33 All 472. 2. (1856) 6 M. I. A. 393 at 424.
3. (1905) I. L. R. 29 Mad. 200.

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nal case against the 1st defendant. The case against the 1st defendant was one of counterfeiting King's coin. The sale is not legally binding on plaintiff. So much money was not spent and there was no reason for spending so much. The debt is not legally binding on plaintiff. This debt was not contracted for any family necessity nor for discharging antecedent debts."

Para 3 *of the written statement of defendants Nos.* 2, 3, 4 *and* 5.

"The purchase-money Rs. 200 was used for proper expenses of the plaintiff and the 1st defendant. The 1st defendant is not a man of immoral habits. The purchase money was not used for immoral or illegal purposes. Therefore the purchase by these defendants is legal."

The issue on these allegations is issue (2) :—"Was the sale deed to defendants 2 to 5 executed and given in the manner alleged by plaintiff?" It is certainly a most unsatisfactory way of stating the question for decision. The issue should have been framed in such a form as to make it clear on what point the plaintiff wished to attack the sale and the defendants to support it. Questions might have been raised on the pleadings :—

(1) Whether the defendants made proper and *bona fide* enquiries as to there being any necessity for the sale.

(2) If not, (*a*) whether the purpose for which the sale was effected was such a purpose as would make the alienation legally binding on the plaintiff and

(*b*) whether the consideration for the sale was, as a matter of fact, utilised for the purpose mentioned in the sale-deed.

I am of opinion these questions arose on the pleadings and it is clear from the issues and from the judgments that these questions have not been considered by the lower Courts. The respondent contends that the appellants cannot now ask for a consideration of these questions as there were no cross-objections to the finding of the lower court that the sale was not binding on the plaintiff a finding which was twice arrived at by the District Munsif. The District Munsif had, however on each occasion dismissed the plaintiff's suit O. 41, R. 22 (2) C. P. C. and the real issues with reference to the validity of the sale-deed have not as yet been adjudicated upon.

The question therefore whether the purpose for which the money was borrowed was not a legal necessity should have been considered by the lower Courts. It is a question of law and we have heard arguments upon it. I feel no difficulty in saying that in my own opinion that question should be answered in the affirmative. My learned brother is delivering a separate judgment on this point. I have had the benefit of reading the judgment he has prepared and I agree with it.

It is clear from the terms of the sale deed and from the plaint itself that representations were made to the defendants that the sale was for the purpose above referred to. Under these circumstances it seems to me unnecessary to call for any fresh finding. The sale should have been held to be binding on the plaintiff and the appeal will therefore be allowed and the suit dismissed with costs in all the courts.

Spencer, J:—It is clear to my mind that money spent in meeting the necessary expense of defending the head of a joint Hindu family in a criminal prosecution is money spent for legal necessity and for the benefit of the members of that family. For this proposition it is sufficient to refer to ***Beni Ram*** v. ***Man Singh*** [1] and ***Sumar Singh*** v. ***Liladhar*** [2].

The former case is one in which in spite of the defence made at the trial the head of the family was actually convicted. Here the prosecution ended in acquittal. This is therefore a stronger case. In the words of the learned Judges who decided that case, "No more pressing necessity could arise from the point of view of members of a Hindu family than the necessity for raising money to defend the head of the family against a serious criminal charge".

Respondent's pleader on this point has referred us to *Mc Dowell and Co.* v. *Ragava Chetty* [3] which was the case of a bond entered into by the head of a Hindu family as security for the due fulfilment of his duties as cashier in which capacity he committed certain defalcations. As pointed out in the judgment, the taking of the misappropriated money was itself, a criminal offence and it was no part of the pious duty of the sons to pay such sums. But every man has a right to defend himself against a

1. (1911) I.L.R. 34. All. 4. 2 (1911) I.L.R. 33 All. 472.
3. (1913) I. L. R. 27 Mad. 71.

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criminal prosecution, and it would be the duty of sons to assist him in his efforts to establish his innocence. The facts admitted in the pleadings and found by the lower Courts here are sufficient to prove legal necessity for Exhibit I although the point was not clearly taken at the trial. I therefore agree in thinking that the appeal should be allowed and the suit dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Muthu Ramakrishna Naicken ...*Appellant** (*2nd Defendant*)

v.

Marimuthu Goundan and another. *Respondents* (*Plaintiff*).

Muthu Ramakrishna Naicken v. Marimuthu Goundan.

Hindu Law—Husband and wife—Joint exertions—Property acquired by—Property of both—Share of wife descends to her heirs—Stridhanam.

Whre property was acquired by a man (a Hindu) and his wife.

Held that the property belonged to both and on the death of the wife, her share descended according to the rules of inheritance prescribed for stridhanam.

Appeal under clause 15 of the Letters Patent from the Judgment and Order of the Hon'ble Mr. Justice Miller, dated 17th April 1913, in Second Appeal No. 1619 of 1912, preferred against the Decree of the District Court of Coimbatore in Appeal Suit No. 37 of 1912, preferred against the Decree of the Court of the District Munsif of Erode in O. S. No. 937 of 1910.

The Court delivered the following

Judgment:—*Sankaran Nair, J.*:—The plaintiffs sue as the legal representatives of one Mottaya Goundan to recover possession of the plaint lands from the 1st Defendant, who held them as his lessee. The lease is admitted but the main contention is that the lands belonged to Mottaya Goundan's wife, Ayyammal, from whose alleged heir, the 2nd defendant has purchased them and is now in possession. It is found by both the Courts that the properties were acquired with the profits earned by Mottaya Goundan and his wife, Ayyammal, in a trade which was carried on by both of them. Both the husband and wife were " equally working together ". It is also stated that among the Padayachi community, to which Ayyammal and Mottaya Goundan belonged, the wife worked along with the husband " for the purpose of the

* L. P. A. No. 98 of 1913. 6th March 1914.

maintenance of the family and development of the family properties." The District Munsif decided, however, that, according to the strict theory of the Hindu Smrithis even the separate property of a woman earned by her by mechanical arts is subject to her husband's control, and that, therefore, the money with which the plaint lands were acquired, was not Ayyammal's peculium. He held that, though the properties were acquired in the name of Ayyammal, that is due to the fact that Mottaya Goundan wanted to shield his properties from the claims of his brothers and possibly also to the fact that Ayyammal was more intelligent than her husband. He further held that, assuming that Ayyammal and Mottaya Goundan must be deemed to have jointly acquired the plaint lands, on the death of Ayyammal, it became the sole property of Mottaya Goundan and as the plaintiffs are admittedly entitled to claim as the representatives of Mottaya Goundan, he passed a decree directing the defendants to surrender them to the plaintiffs. In Appeal the Subordinate Judge confirmed the District Munsif's decision. His decision was confirmed by *Mr. Justice Miller.* This is an appeal from his Judgment.

In the Lower Courts the main question that was argued appears to have been that the properties belonged solely to Ayyammal. In Second Appeal before us the main contention was that, on the facts proved, it cannot be held that the property belongs only to the husband.

If properties are acquired jointly by two persons, both of them males, the two would be joint owners. The question then is whether the fact that the properties in suit were acquired jointly by husband and wife makes any difference. If it was open to the wife to acquire property for herself by her own exertions during coverture, it would seem to follow that, if she acquired the property along with her husband, then they must be deemed to be joint owners. According to the Mitakshara, which is the leading authority in this Presidency, property however acquired by a woman is her Stridhanam and on her death her heirs take it. This view is no doubt, directly opposed to the view maintained by the Daya Bhaga and certain other authorities, according to which that alone is Stridhanam which the wife has power "to give, sell or use independently of her husband's control." See Mayne's Hindu Law (7th Edition), paragraph 610. Gifts to a woman in her capacity of bride or wife or given by her

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husband or by her relations or by her husband's relations are admittedly her exclusive property with the doubtful exception of gifts of immoveable property by the husband in certain circumstances. It is now also settled law in Bengal and Madras that the property inherited by a woman is not her exclusive property. Her right with reference to the property otherwise acquired, according to the Mitakshara, "by inheritance, purchase, partition, seizure, or finding" has been the subject of much discussion. It has now been settled that she may acquire property by gift from strangers during coverture and that it would devolve on her heirs. See *Ramasami Padayachi* v. *Virasami Padayachi* [1]. It has also been held that property may be given to a husband and wife jointly and that property may also be purchased by them jointly. Her husband's interest in such property would devolve on his heirs and her interest in the property would devolve on her heirs. See *Madavaraya* v. *Tirtha Sami* [2]. Property may also be devised to them jointly. See *Muthumeenakshi Ammal* v. *Chandrasekhara Aiyar* [3]. This is also the conclusion arrived at in *Salemma* v. *Latchmana Reddy* [4]. There an inam land was enfranchised in favour of a woman, and the question was whether it was her stridhanam property descendible to her heirs or not. The texts were reviewed and it was held that the Mitakshara should be followed, unless there is such a consensus of opinion among the commentators prevalent in Southern India as to suggest that the Mitakshara has been departed from, or in other words, that it is open to a female to acquire ownership in any of the modes in which it is open to males, and all such property, with the exception of that acquired by inheritance, is her stridhanam, devolving on her own heirs. The learned judges accordingly held that a wife's earnings and gifts to her by strangers are her stridhanam property descendible to her heirs. This is a direct decision on the point and is in favour of the appellant. But as our learned colleague has apparently taken a different view, we propose to review the Hindu Law texts on this point, though neither the texts nor the cases above referred to, we are informed, were cited before the learned Judge.

The question, as we have already stated, is whether a married woman's earnings are her exclusive property. Mr. Mayne adduces passages from the Vedas to show that in early

1. (1867) 3 M. H. C. R. 272.
2. (1877) I. L. R. 1 M. 307.
3. (1902) I. L. R. 27 M. 498.
4. (1897) I. L. R. 21 M. 100.

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times married women pursued independent occupations and acquired gains by them. See Mayne's Hindu Law VII Edition, paragraph 656. According to Manu (Ch. VII, Sloka 416), however, a wife is declared to have no property. The wealth which she acquires is said to be acquired for him to whom she belongs. Four of the commentators of Manu, and among them Medhatithi, take this to mean only that she is unable to dispose of her property independently of her husband. Another commentator, according to Mr. Buhler, the editor, seems to indicate that he took it to refer to her incapacity to earn money by working for others." See Sacred Books of the East Vol XXV, page 326.

The text that is generally referred to with reference to a woman's earnings is that of Katyayana which is thus translated by Colebrooke in his Digest Vol. II, page 589, Sloka 470:—" But whatever wealth she may gain by arts, *as by painting or spinning*, or may receive on account of friendship from any but the kindred of her husband or parents her lord alone has dominion over it: Of her other property she may dispose without first obtaining his assent. The commentator Jagannatha states that " 'arts' in this text is expressed in the plural number with the sense of 'and the rest'." We have already pointed out that this text has not been followed in this Presidency as regards gifts from others than her husband's or her own kindred. In the Dayabhaga this text is understood to imply that "though the wealth be hers, it does not constitute woman's property, because she has not independent power over it." The Dayakrama Sangraha (Stoke's Hindu Law Books, page 490) is to the same effect. Chapter II, Section ii, Sloka 29, states "notwithstanding the woman has ownership in both descriptions of property, she has not independent power in regard to it" as the husband's permission for its disposal is necessary. In the Viramitrodaya we find the same proposition laid down in Chapter V, Part I, Slokas 2 and 7. The ownership of the woman in the properties is acknowledged; it is only her power of alienation that is declared subject to the husband's control. It is said "the denial is not of their being woman's property, but of its consequences, such as distribution etc." Devala also mentions a woman's gains as part of her separate property over which she has exclusive control, and which her husband cannot use except in times of distress. Mr. Mayne thinks that the word is apparently used by

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Devala in the sense of gifts. Mayne's Hindu Law, VII Edition, paragraph 663. All the texts, therefore, recognise, the wife's ownership in the property acquired by her own labour. They only restrict her right of alienation and make it subject to the wishes of her husband. Mr. Mayne considers the question in paragraph 663 and his conclusion is that these texts with reference to the husband's control do not seem to convey anything more than a moral precept, while the texts asserting her absolute power are "express and unqualified". It is unnecessary to express any opinion as to the husband's right to control any alienation by his wife, as that question does not arise in this case. But we think that Mr. Mayne is right in his view that the property acquired by a woman by her own exertions during coverture is her own property which she is entitled to hold independently of her husband and that it devolves on her heirs. The Mitakshara is clear in favour of this conclusion and the other texts also recognise her ownership, though they convey an injunction that she is not to alienate the property without her husband's consent. This is due to general incapacity of woman to deal with property. These texts do not over-ride the express provision of the Mitakshara which declares her self-acquisition to be her own Stridhanam; and we are confirmed in this view by the decisions cited.

We think, therefore, that the property in suit was the joint property of Ayyammal and her husband. If it formed joint property, there is no reason, for holding that, on the death of Ayyammal, her interest survived to her husband. In *Madavaráya* v. *Tirthasami* [1] which we have already cited, the theory of survivorship was not recognised and it was held that the woman's own heirs were entitled to her undivided interest. Ayyamal's daughters, therefore, are the persons entitled to her property. They became co-owners with their father Mottaya Goundan on Ayyammal's death. There is no finding that their right has been lost by adverse possession. Mottaya's possession cannot be deemed adverse to his daughters who were co-owners with him.

On this finding the plaintiffs, who claim under Mottaya, are only co-owners with his (Mottayan's) daughters. The first defendant admittedly got into possession as lessee under Mottaya

1. (1877) I. L. R. 1 M. 307.

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the plaintiffs are co-owners, and no objection was taken in the lower Courts that they alone cannot maintain the suit; but the first defendant set up the title of the second defendant; who is found by the District Munsif to have no title, as he purchased the property from Velayuda Goundan, who is not the heir of Ayyammal. Though the suit is one in ejectment, a decree for joint possession may be passed. In the circumstances, we set aside the decrees of the Lower Courts, direct the District Munsif to restore the suit to his file, make the daughters or other representatives of Ayyammal parties to the suit, and pass a decree in accordance with law. The costs *hitherto* incurred will abide the result.

Ayling, J:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Tyabji and Mr. Justice Spencer,

Chettikulam Prasanna Venkatachala Reddiar — *Appellant (2nd Defendant)*.

v.

The Collector of Trichinopoly Srirangammal (died) — ***Respondent (Plaintiff and 1st Defendant)***.

Prasanna Venkatachala Reddiar
v.
Srirangammal

Civil Procedure Code, S. 92—Suit under—Alienee from trustee—Declaration against—If claimable—O. 22 R. 411—Appeal by alienee—Death of trustee pending appeal—Abatement—"Right to sue"—Meaning of—Limitation Act, S. 10—Assignee for consideration—Limitation in favour of, though not in good faith or without notice—Effect of good faith and no notice

Where in a suit brought by the Collector under S. 92 C.P.C. against the trustee as well as an alienee from him praying *inter alia* for a declaration that the alienation in favour of the latter was not binding against the trust, a declaration having been made to that effect, the alienee appealed making the trustee as well as the Collector parties but pending appeal, the trustee died and his legal representatives were not brought on record.

Held that as the trustee was not a necessary party to the appeal, the appeal as against the collector did not abate.

Held further that the cause of action against the alienee (who was an alienee for consideration) arose on the date of the alienation and more than six years having elapsed from that date, the suit was barred by limitation under Art. 120, of the Limitation Act. Limitation will run in favour of alienees for consideration though they may not be alienees in good faith or without notice. Trust property in the hands of alienees for consideration in good faith and without notice cannot be followed at all.

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*A. No. 268 of 1911. 18th March 1914.

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Tyabji J.

Per Tyabji J: The words "right to sue" when applied to appeals mean right to obtain relief."

Quaere whether alienees of or trespassers on trust property can be joined in a suit under S. 92 C. P. C.

Appeal from the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 2 of 1910.

On 9th December 1909. The Collector of Trichinopoly as representing the Secretary of State for India in Council instituted O.S. 2 of 1910 on the file of the Subordinate Judge's Court, Trichinopoly under S. 92, C. P. C. for removing the 1st defendant from the trusteeship of certain chatram charities, and for other reliefs, and also for a decalration that an alienation made by the 1st defendant to the 2nd defendant of certain lands attached to the said charity, dated 26-1-1899 was not binding on the trust. The Subordinate Judge gave a decree as prayed for. The 2nd defendant filed this appeal. Since the filing of the appeal the 1st defendant who was made a Respondent to this appeal died and her legal representatives were not brought on the record.

The Government Pleader for the Collector raised a preliminary objection that the appeal abated and argued:—O. 22, R. 4, read with R. 11 applies to this case. The suit against 2nd defendant alone could not have been instituted without the 1st defendant being made a party. The right to sue therefore does not survive in the absence of somebody representing the interest of 1st defendant. Further for a complete adjudication of the questions involved the 1st defendant's legal representatives are necessary parties. It may be that in case the appeal of the 2nd defendant is dismissed, the right of the 2nd defendant to recover damages from the 1st defendant will be affected by reason of the appellate decree not being binding on the 1st defendant. Again the right of the beneficiaries under the trust to recover the value of the properties improperly alienated by the 1st defendant will be prejudicially affected by reason of the validity of the alienation being contested in a proceeding to which the trustee is not party. The question is 'does the right to sue survive'? The question is not 'does the right to appeal' survive. *Dharanjit Narayan Singh* v. *Chandeshwar Proshad Narayan Singh* [1] *Srinivasa Chari* v. *Gnana Prakasa Mudaliar*[2].

1. (1907) 11 C. W. N. 504. 2. (1906) I. L. R. 30 M. 67.

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Tyabji J.

T. M. Krishnaswami Aiyar for the appellant.

The word 'right to sue' in O. 22, R. 4 has been construed liberally to include 'a right to obtain relief by legal procedure,' It ought not to be confined to a right to institute a suit *Gopal Ganesh Abhyankar* v. *Ramachandra Sadashiv Sahasrabudhe* [1] This view has been accepted by the Madras High Court in *Paraman Chetty* v. *Sundararaja Naick* [2] and *Josiam Thiruvengadachariar* v. *Swami Iyengar* [3]. The view of the Allahabad High Court is the same *Ram Sewak* v. *Lambar Pande* [4].

The right to appeal is vested in every party individually and that is not taken away simply because another is dead. If in this case both the defendants had appealed together and one of them is dead, the appeal can certainly go on so far as the surviving appellant on record is concerned. The position is in no way altered by reason of the deceased appellant happening to have been made a respondent, See *Mehdi Husain* v. *Sughra Begam* [5] The section itself makes it clear that the appeal abates only as against the respondent whose representatives have not been brought on the record. See *Chandarsang* v. *Khimabhai* [6], *Alla Bakhsh* v. *Madho Ram* [7], *Bai Full* v. *Adesang Pohadsang* [8], *Joy Gobind Laha* v. *Monmotha Nath Banerji* [9], *Upendra Kumar Chakravarthi* v. *Sham Lal Mandal* [10], *Veerabadra Aiyar* v. *Marudaga Nachiar* [11] *Gade Sashamma* v. *Bulusu Venkata Suryanarayana* [12] and *Raj Chunder Sen* v. *Ganga Das Seal* [13].

The case in *Dharanjit Narain Singh* v. *Chandeswar Proshad Narain Singh* [14] is distinguishable as there the Court could not adjudicate on the matter in controversy without the representatives of the deceased on record and is one of the class to which the case in *Rajchandar Sen* v. *Ganga Das Seal* [13] belongs.

In this case there is a declaratory relief against the 2nd defendant in which he alone is interested. He has therefore a right of appeal against the plaintiff who has obtained that relief in the Court below.

1. (1902) I. L. R. 26 B. 597.
2. (1902) I. L. R. 26 M. 499.
3. (1910) I. L. R. 34 M. 76.
4. (1902) I. L. R 25 A. 27.
5. (1902) I. L. R. 25 A. 206 at 208, 209.
6. (1897) I. L. R. 22 B. 718.
7. (1900) I. L. R. 23 A. 22.
8. (1901) I. L. R. 26 B. 203, 206.
9. (1906) I. L. R. 33 C. 580.
10. (1907) I.L.R. 34 C 1020 at p. 1023.
11. (1910) M. W. N. 799.
12. (1914) M. W. N. 61.
13. (1904) I. L. R. 31 C. 487.
14. (1907) 11 C. W. N. 509.

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The difficulties suggested by the learned Government Pleader will not arise having regard to the cases set up by 1st and 2nd defendants separately.

At this stage their Lordships intimated that they will hear the appeal on the merits.

T. M. Krishnaswami Aiyar for appellant submitted.—

The 2nd defendant being a purchaser from the trustee was not a proper party to a suit under section 92. The Madras High Court has throughout held that a claim against an alienee from the trustee or a trespasser on trust property cannot be joined in a suit for reliefs mentioned in S. 92. C. P. C. Vide the decisions under the old Code *Subbayya* v. *Krishna* [1], *Augustine* v. *Medlycott* [2], *Srinivasa Ayyangar* v. *Strinivasaswami* [3], *Arunachella Chettiar* v. *Muthu Chettiar* [4], *Rangasami Naickan* v. *Vardappa Naickan* [5]. The changes in the old Code S. 539 as embodied in S. 92 N.C. go only to shew that if at all, the Legislature adopted the limited construction placed on S. 539 by the Madras High Court. A new right of suit and a new jurisdiction was created and therefore the section has to be interpreted strictly. See Maxwell pp. 412 and 521. Excepting these decisions, in all the decisions of all the courts are in favour of the view that strangers cannot be made parties to an administration action and the case in *Sajedur Raja Chowduri* v. *Mohun Das Baishnar* [6] has been dissented from in the subsequent cases *Ghazaffar Husain Khan* v. *Yawar Husain* [7], *Budh Singh Dudhuria* v. *Nirad Baran Roy* [8], *Budree Das Mukin* v. *Chooni Lal Johurry* [9]. See also *Kasi Hassain* v. *Sajun Balkrishna* [10], *Lakshman Das Parashram* v. *Ganpatrav Krishna* [11], *Vishvanath Govind Deshmane* v. *Rambhat* [12], *Huseni Begam* v. *The Collector of Moradabad* [13]. The clause referring to other reliefs must be read as *ejusdem generis* and not as a head independent of the prior heads of relief. See *Narasimha* v. *Ayyan* [14].

The section has been derived from the Romilly's Act and it is settled law so far as Madras is concerned that S. 92 has to

1. (1890) I.L.R. 14 M. 186.
2. (1892) I.L.R. 15 M. 241. at 246.
3. (1892) I.L.R. 16 M. 31 at 33.
4. (1880) 23 M.L.J. 347.
5. (1891) I.L.R. 17 M. 462.
6. (1897) I.L.R. 24 C. 418.
7. (1905) I.L.R. 28 A. 112.
8. (1905) 2 C.L.J. 431 at 439.
9. (1906) I.L.R. 33 C. 789 at pp. 804, 805
10. (1899) I.L.R. 24 B. 170 at 181
11. (1884) I.L.R. 8 B. 365 at 367
12. (1890) I.L.R. 15 B. 148.
13. (1897) I.L.R. 20 A. 46.
14. (1888) I.L.R. 12 M. 157.

be construed in the light of the decisions on the Romilly's Act and hence very narrowly. See *Attorney General* v. *Portreene Alderman, and Burgesses of Avon* [1] *In re Manchester New College* [2], *Fairbrother* v. *Beale* [3] Further sub-cl. (2) of S. 92, bars the other remedies and a statute barring the common law remedies must be strictly construed. The relief regarding the vesting of the property does not imply a power to determine the validity of alienations. It is simply intended to complete the appointment of a new trustee. A trust implies ownership in the trustee with an obligation annexed to it. Without the vesting of the trust property the trust will be incomplete see, *Kathiawar Trading Company* v. *Virchand Dipchand* [4], *Marbenton in Sandys* [5], *Owen* v. *Owen* [6], *Foley* v. *Wontner* [7] see also definition of trust in the Trusts Act S.75.

The relief by way of declaration is barred by limitation as the suit is brought against the 2nd defendant more than six years from the date of alienation. Art. 120 applies *Ottappurakkal Thazhate Soopi* v. *Cherichil Pallikkal Uppathumma* [8] a direct authority for the position that knowledge of the cause of action is not necessary for the running of time. See also *Akbar Khan* v. *Turaban* [9], *Francis Legge* v. *Rambaran Singh* [10] Limitation runs against the trust in favour of purchasers for value see S. 10, Limitation Act. Even assuming that knowledge is necessary for the running of time, there is evidence that the Collector had knowledge of the alienation more than 6 years before the suit. The suit was bad because it was not properly instituted so as to give jurisdiction. The section requires that the suit must be instituted by the Collector in his capacity as Collector and not in his capacity as representing the Secretary of State. The section creating a new right of suit and a new jurisdiction has to be strictly construed. The subsequent amendment of the plaint will not make the original institution an institution by the Collector. See *Ramayyangar* v. *Krishnayyangar* [11]. The decision in [12] is wrong and has been based on an erroneous interpretation of the Privy

1 (1863) 33 L J. N. S.Ch. 172
2. (1853) 16 Beav. 610.
3. (1849) 3 De G. J. &. S. 637.
4. (1893: I. L. R. 18 B. 119. pp 130, 131
5. (1845) 14 Sim. 622.
6. (1738) 1 Atkins. 496 S.C. 426 E.R. 318
7. (1820) 2 Jac. W. S.C. 37 E.R. 621
8. (1909) I. L. R. 33 M. 31.
9. (1908) I. L. R. 31 A. 9.
10. (1897) I. L. R. 20 A. 35.
11. (1886) I. L. R. 10 M. 185.

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Council decision *Darves Haji Mahomed* v. *Jainudin* [1] as is pointed out in *Jan Ali* v. *Ram Nath* [2] and *Gopal Dei* v. *Kuno Dei* [3] and *Chandu Lal Khushalji* v. *Nawaz Jung Bahadur* [4].

The Government Pleader for the Collector. S. 92 has to be construed liberally. A section enacted to prevent breaches of trust and for the protection of charities must be construed so as to advance the remedy and suppress the mischief. The vesting of the property is one of the reliefs specified in that section. For the purpose of vesting the property, it is necessary to determine whether particular alienations of trust property are valid or not. An adjudication in this behalf cannot usefully be made in the absence of the alinees. Hence the alienees are proper parties. Further the Legislature has not accepted the law as laid down by the Madras High Court as will be seen from the amendment made in S. 539 of the old code in the new S. 92, C. P. C. The last clause in the list of reliefs given in Sec. 92, ought not to be read as confined to such reliefs consequent upon or incidental to the heads of relief mentioned before. Under that clause it is open to the Courts to grant such relief as they may think the nature of the case requires.

Under the new code it is not necessary that a plaintiff should specifially ask for such other reliefs as the Court may deem fit to grant, See O. 7, R. 7, C. P. C. The specific mention of 'other relief as the nature of the case may require' in S. 92, C. P. C. would seem to show that the legislature intended in Cl. (*h*) to constitute a head of relief independent of the prior heads of relief and to vest in the Court a very wide jurisdiction to grant the necessary reliefs in a case coming under S. 92.

These heads of relief must also be read with the cause of action for a suit under S. 92, *i.e.* 'any alleged breach of any express or constructive trust'. It can hardly be that the Court which entertains a suit under S. 92 has no power effectively to deal with the breach of trust found to have been committed and this would be the result if it were held that strangers cannot be made parties to a suit under S. 92.

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1. (1906) I.L.R. 30. B. 603.
2. (1881) I.L.R. 8 C. 32.
3. (1903) I.L. R. 26 A. 162.
4. (1896) I.L.R. 21 B. 351.

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The decision in *Sajedu Raja Chowdhri* v. *Gour Mohun Das* [1] takes the correct view of the scope of S. 92. This is followed in *Ghazappar Husain* v. *Yamar Husain* [2].

The article of the Limitation Act that applies will be Art. 120. Time will begin to run from the date when the right to sue accrues. The accrual of the right to sue necessarily presupposes a knowledge of the circumstances under which the said right arises. Hence the present suit for declaration is not barred. Art. 134 starts the time running from *the date of transfer*. Art. 120 does not say so. The language employed is different. *Ranchordar* v. *Parvati Bai* [3] *Chiruvolu Ponnamma* v. *Chiruvolu Perraya* [4] and *Khajet Salimullah* v. *Abdul Khair Mustapha* [5] ref.

The suit was rightly laid by the Collector himself. It is the Collector that verified the plaint. By a mistake the description was wrong. The case in 30 Bom. is entirely different. The Court has ample power of amendment under the new Code.

T. M. Krishnasami Iyer replied.

The Court delivered the following

Judgments:—*Tyabji, J.*—The Collector of Trichinopoly is the plaintiff. The suit is instituted under Ss. 92 and 93 of the Civil Procedure Code.

The first defendant (now deceased) was the alleged trustee and manager of the charities referred to in the plaint. The second defendant was alleged to be a transferee from the first defendant of a portion of the lands appertaining to the charitable trust.

The prayers against the 1st defendants were for removal of the 1st defendant from the trusteeship and for accounts. There was a prayer (*b*) "to declare the sale to the second defendant of the lands belonging to the charity to be invalid." This is the only relief claimed against the 2nd defendant. There were other prayers for the appointment of a new trustee and for vesting the trust property in the trustee so appointed. The plaintiff obtained all the reliefs asked against both the defendants in the lower court.

1. (1897) I. L. R. 24 C. 418.
2. (1905) I. L. R. 28 A. 112.
3. (1899) I. L. R. 23 B. 725 P. C. at 730
4. (1906) I. L. R. 29 M. 390.
5. (1909) I. L. R. 37 C. 263 at 264, 278.

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There were appeals against this decree by each of the defendants. But the first defendant is now dead, and her representatives not having been brought on the record, her appeal has abated and has been dismissed by us. The present appeal is by the second defendant.

It was contended before us on behalf of the plaintiff that the second defendant's appeal must also abate, inasmuch as the first defendant who was originally a respondent to this appeal is now dead and her legal representatives have not been brought on the record as required by O. 22.

In my opinion the appeal does not abate.

The mere fact that one of the respondents is dead and that his representative is not brought on the record will not make the appeal abate if the right survives to the appellant. In *Gopal* v. *Ramachandra* [1] It was succinctly stated that when the sections of the C. P. C., which are now replaced by O. 22 have to be applied to appeals the words 'the right to sue' must be construed as meaning "the right to prosecute by law, to obtain relief by means of legal procedure." This is not expressly stated in O. 22 R. 11 which may be styled the interpretation clause of the Order. But several rules in the order become meaningless in their application to appeals unless these words are added; and the addition of these words would follow from giving to the expression "a right to sue" a meaning cognate to that which the rule expressly gives to the word "suit" *Gopal* v. *Ramchandra* [1] was followed in *Paramen Chetty* v. *Sundaraja Naick* [2].

The relief which the second defendant claims in appeal is first, that, as he was not a necessary party to the suit, his name should be struck off from the record, and secondly that if there was any cause of action against him it was barred by limitation; that in either case the suit should be dismissed as against him. If the second defendant is entitled to claim this relief, he is entitled to do so in his sole right. The only person against whom this relief is claimed is the plaintiff. On the death of the 1st defendant, the second defendant's right to claim this was not affected. A test for deciding whether the right survives was suggested by the Government Pleader: *viz.*, whether the appellant can

1. (1902) I. L. R. 26 B. 597 at 602, 608 and 607.
2. (1902) I. L. R. 26 M. 499.

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succeed, and the decree can be reversed, without bringing the legal representative of the deceased party on the record. This test is satisfied in the present appeal. The question on which adjudication is sought by the second defendant as appellant before us will not affect the deceased party. See *Srinivasa Chari* v. *Gnanaprakasa Mudaliar.* [1] An ingenious argument was put forward on this point, that the lower court's decree entitled the 2nd defendant to sue the first defendant for damages for breach of covenant for title—if there was any such covenant; that the first defendant was consequently interested in the appeal of the 2nd defendant. The argument does not seem to require any detailed refutation. I hold therefore, that the appeal does not abate.

On the merits, several questions of law were argued before us. It is necessary to deal only with the question of limitation. I am of opinion that the claim, if any, against the second defendant was barred.

I express no opinion on the point whether the plaintiff had any cause of action against the second defendant; but will assume that in the circumstances of this case, though the suit was brought by the Collector under Ss. 92 and 93 of the Civil Procedure Code such a declaration as is here sought by prayer (*b*) can be asked and obtained against a person who claims to be a transferee from the trustee.

It was suggested in the first instance that the Collector's right to obtain this relief (assuming it exists) is not barred as S. 10 of the Limitation Act prevents the right to follow the trust property in the second defendant's hands, from being barred by any length of time. The second defendant has been found to be an assign for valuable consideration and that finding has not been attacked before us. But it was argued that it has not been found that the second defendant is a transferee in good faith and that the mere fact of his being a transferee for consideration will not make the plea of limitation available to him, unless he is also a transferee in good faith. This contention cannot be upheld. Trust property in the hands of a transferee in good faith for consideration without notice of the trust cannot be followed by the beneficiary at all. See Trusts Act S. 64. The right to follow arises only where the transferee has not acted in good faith.

1. (1906) I. L. R. 30 M. 67, 68, 69.

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(1) If such a transferee has paid no consideration he is not an assign for valuable consideration within the terms of the Limitation Act S. 10, and in his case a suit for the purpose of following trust property is not barred by any length of time. But (2) where the transferee is an assign for valuable consideration, (*a*) if he has acted in good faith , without having notice of the trust he acquires immediate title to the property under S. 64. of the Trust Act; or (*b*) if he has not acted in good faith, but has paid valuable consideration, he acquires good title after the lapse of the period necessary for extinguishing (under S. 28 of the Limitation Act) the right of the beneficiary to follow the trust property in his hands. This is in accordance with principle. Where there is valuable consideration for the transfer the original trust property is replaced by the consideration. There is no such consideration, and no question is raised here as to the adequacy of the consideration.

If limitation can be pleaded then the article applicable to the suit is Article 120. This was conceded. It was argued, however, by the learned Government Pleader that time did not begin to run from the date of the execution of the sale of the 26th January 1899 which is alleged to have been made in breach of trust and a declaration of the invalidity of which is sought in prayer (*b*) of the plaint but that it began to run only from the time when the Collector was informed of the facts entitling him to take action under S. 92 of the Civil Procedure Code. It was strenuously pressed upon us that a public officer has no duty cast upon him to go round and examine public trusts and that suits which he is entitled to institute must not be allowed to be barred though he may have no knowledge of his right to sue. The article must, however, be construed as it is, and I find myself unable to see how the meaning suggested by the learned Government Pleader can be read into the words " when the right to sue accrues." The article must be construed as it is notwithstanding that Art. 134 prescribes a period of 12 years from the date of the purchase from a trustee when possession is sought for. If the Collector can sue under S. 92 of the Civil Proceedure Code for a declaration against an alleged transferee in breach of trust, (on which point I express no opinion), then the suit must it seems to me be brought within 6 years of the sale. Time began to run therefore on 26th

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January 1899, and the suit was brought more than six years thereafter. It was in my opinion barred by limitation.

The appeal will be allowed and the suit dismissed against the second defendant. The costs of both parties to the appeal in both courts will be payable out of the Trust funds, but the appellant will recover his whole costs first and the 1st respondent will recover his costs only out of the balance. We are informed that some costs incurred in the lower court have been recovered by the Collector from the Appellant. These will have to be refunded to the appellant, and under S. 82 of the Civil Procedure Code we specify 4 months from this date for this being done.

Spencer, J:—I agree that the appellant can obtain the relief that he seeks in this appeal without making the legal representatives of the 2nd respondent parties.

In *Durga Charan Sircar* v. *Jotindra Mohan Tagore* [1] the test employed for ascertaining whether a particular defendant was a necessary party to the suit was to see (1) whether there was a right to some relief against him in respect of the matter involved in the suit; (2) whether his presence was necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The questions involved in an appeal do not necessarily include all the questions involved in the suit to which it is related. If we read 'appeal' wherever the word 'suit' occurs in the above passage and consider what are the reliefs asked for by the appellant in the present appeal it will appear that he can obtain all that he wants without the presence of the 1st defendant or her legal representatives.

There has been considerable divergence of opinion in the reported decisions of Courts of India as to the scope of S. 539 (corresponding to S. 92 of the code of 1908) before the present code became law. Now the question as to the powers of a court proceeding under S. 539 to remove trustees (held to be within the competence of the court by *Sabbayya* v. *Krishna* [2] *Husein Begam* v. *The Collector of Moradabad* [3] *Girdhari Lal* v. *Ram Lal* [4] *Sajedur Raja Chowdhari* v. *Gour Mohum Das Baishnay* [5] and held to be without the competence of the Court by *Narasimha* v. *Ayyan* [6] *Rangaswami Naickan* v. *Varadappa Naickan* [7]

1. (1899) I. L. R. 27 C. 493 at page 497.
2. (1890) I. L. R. 14 M. 186.
3. (1897) I. L. R. 20 A. 46.
4. (1899) I. L. R. 21 A. 200.
5. (1897) I. L. R. 24 C. 418.
6. (1888) I. L. R. 12 M. 157.
7. (1891) I. L. R. 17 M. 462.

Budree Das Meekin v. *Choone Lal Johurry* [1] *Budh Singh Dadhuria* v. *Niradharan Roy* [2]) has been settled by the legislature introducing clause (*a*) in S. 92 (1). It is still a debateable question whether alienees of or trespassers on trust property can be joined as parties to a suit under this section. It was held in *Ghazaffar Husain Khan* v. *Yawar Husain* [3] that alienees could be impleaded for the purpose of determining what properties are affected by the trust and in *Sajedur Raja Chowdhari* v. *Gour Mohum Das Baishnay* [4] that they could be made parties for the purpose of recovering from them properties improperly alienated; but in *Augustine* v. *Medlycott* [5] *Strinivasa Ayyangar* v. *Strinivasa Swami* [6] *Kazi Hussain* v. *Sagun Balakrishna* [7] *Arunachella Chetti* v. *Muthu Chettiar* [8], *Budree Das Mukim* v. *Chooni Lal Johurry* [9] and *Budh Singh Dhuduria* v. *Niradbaran Roy* [10] it was decided that the section was not applicable to suits against strangers to the trust.

Now assuming without accepting that the Government Pleader is correct in his contention that the object of the section as shown by the addition of clause 2 is to protect trusts against multifarious suits, that the words of the section are very wide, that the reliefs (*a*) to (*g*) are illustrative and do not limit the grant under (*h*) of such further or other relief as the nature of the case may require, the plaintiff's suit must still fail as against the 2nd defendant unless he can show that it is in time.

The relief asked against the 2nd defendant is a declaration that the sale of the trust properties to him is invalid, This suit can hardly be treated as a suit for recovery of possession of trust properties for which article 134 would be appropriate.

It was held in *Ottappurakkal Thayath Soopi* v. *Cherichal Pallikhal Uppathumma* [1] that the right to sue for a declaration that an alienation of property is invalid falls under article 120 of the Limitation Act and accrues at the completion of the document, not when the plaintiff obtains knowledge of the alienation. The second defendant purchased under Exhibit B on 26th January 1899 and the plaint is dated 7th October 1909. Article

1. (1906) I. L. R. 33 C. 789.
2. (1905) 2 Cal. L. J. 431. 1.
3. (1905) I. L. R. 28 A. 112.
4. (1892) I. L. R. 15 M. 24
5. (1882) I. L. R. 16 M. 31.
6. (1899) I. L. R. 24 B. 170.
7. (1880) 23 M. L. J. 347.
8. (1906) I. L. R. 33 C. 789.
9. (1905) 2 C. L. J. 431.
10. (1909) I. L. R 33 M. 31.

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120 allows six years from the date of the right to sue accruing. The Sub-Judge finds that the Collector became aware of the alienation when he received the report of the Revenue Inspector Exhibit H dated 19th February 1905, but it appears that he was aware of some trust properties having been misappropriated and alienated when he passed the proceedings Exhibit 1 dated 9th June 1899. I therefore consider that the relief sought against the appellant is in any case time barred, and I agree in dismissing the suit against him with costs to be paid as directed in my learned brother's judgment.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, Kt., Chief Justice and Mr. Justice Oldfield.

In re Messrs. Crompton & Co.

v.

Secretary of State for India in Council.

In re Messrs, Crompton & Co. v. Secretary of State for India.

Ethics of cross-examination—Suggestion of counsel acting under instructions—Dishonest act—Duty to substantiate the charge or withdraw—Jurisdiction of the Court to pronounce upon the matter.

Their Lordships held that they had no authority to pronounce on the matter but at the express invitation of Counsel on both sides expressed it as their "pious opinion," that the imputation complained of ought in the particular circumstances to have been withdrawn

16th March 1914.

Nugent grant instructed by *Branson* and *Branson* for Appellant.

The Hon'ble The Advocate General (F. H. M. Corbett) instructed by the Government Solicitor for the Respondent.

The following extracts from the short hand notes of the argument, before their Lordships may be found useful.

Mr. Nugent Grant.—I am exceedingly sorry to trouble your lordships at all. The Advocate-General will understand that this is no personal matter between himself and myself. I am here to represent my client Mr. Weston who is representing in his turn Messrs. Crompton & Co. In the course of the trial before Mr. *Justice Wallis*, I took exception, rightly or wrongly, I still believe —to the manner in which the Advocate-General sought to conduct the Government case in regard to the cross-examination of Mr. Weston. I shall refer your Lordships to the shorthand note

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in order to show, if my view is right, that the Advocate-General sought to impute charges of forgery against Mr. Weston which charges he did not subsequently withdraw; and, I submit, in fairness to Mr. Weston the learned Advocate-General should either have substantiated those charges or should have withdrawn them. He has done nothing of the kind. The point to which I invite your lordships' opinion is that whether the question that were put by the Advocate-General contained the suggestion of forgery and, if so, I desire an explanation from the Advocate-General as to the foundation on which he put those questions to Mr. Weston. In the lower court I drew Mr. *Justice Wallis'* attention to the questions as they were put by the Advocate-General and pointed out to his Lordship that the Advocate-General was accusing Mr. Weston of forgery, and before I concluded my address I again brought this to Mr. *Justice Waills'* notice. His Lordship asked me to settle the matter with the Advocate-General. I said I did not wish to do that as I did not wish to introduce a personal element into the matter. His Lordship forgot to give me a ruling. The matter came before your lordships and some reference has been made. I am either wrong or right. If I am wrong I unhesitatingly apologise to the Advocate-General. On the other hand, if I am right, I think the Advocate-General should either substantiate those charges or withdraw them, because, I say, to put it mildly, it is very unfair for counsel in any position, much more so in the position of the Advocate-General, to make charges of this character against a man of Mr. Weston's position who, by reason of the fact he was a witness in the case was unable to protect himself.

* * *

Before I refer to the evidence I want to remind your Lordships of three documents of which your lordships have heard a considerable amount in the arguments presented to your Lordships concerning them. Your Lordships will remember that Mr. Weston stated that on the 8th July he received a specification for brick work which specification he returned, and to this specification was added a further specification for coursed rubble; and he received it back on or about the 27th July. The document which Mr. Weston received on the 27th July was Exhibit J. That document is before your Lordships and your Lordships will see the original. Mr. Weston

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wrote 26th July on it and altered it to the 27th. It is Mr. Weston's case that on the 11th August he signed a formal contract. The contract which he signed on the 11th August refers to a schedule and specification dated 27th July. Ex. K. is the document of the 11th August, "the form of tender signed by "our Chief Engineer in India, Civil Department, Mr. Ronald J. Weston." Mr. Weston's case in the lower court was that on that date, the 11th August, he signed a specification and estimate, copies of which he sent to his Home Board by the next following mail. The specification which he sent to his Home Board was produced by Mr. Weston and marked HHH in this Court.

The Chief Justice.—Does it purport to be a copy of the original specification.

Mr. Grant.—It purports to be a copy of the original specification which Mr. Weston signed on the 11th August, a copy of which he asked his clerk to prepare and which was forwarded to the London Office shortly after 11th August.

The Chief Justice.—What became of the original.

Mr. Grant.—I called upon the Government to produce it and they never chose to do so. If your lordships will kindly turn to book 2 page 94 at the end of Ex. HHH, you will see that it purports to be a copy of the document which was signed by " M. Brown, 27th July, 1909, Executive Engineer, Madura Division. " Initialled M. B., 11th August 1909". My case is, that the Advocate-General charged Mr. Weston with the forgery of that document. The suggestion is the original did not bear Mr. Brown's initials; or the date.

The Chief Justice.—The 11th August was the date of the contract ?

Mr. Grant.—Yes, my Lord. Your Lordships will remember that HHH was not relevant to any specification in issue in this case. There was no issue as to whether HHH formed part of the Clibborn contract. The question was not whether the specification which formed part of the August agreement formed part of the Clibborn contract. As your lordships have heard over and over again it was the July specification that was in issue before Mr. Justice Wallis. It was the question before His Lordship whether the July specification formed part of the Clibborn contract. Any questions directed by the Advocate-General to the

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authenticity of this document must and could only have been put in for the purpose of impeaching Mr. Weston's credit.

* * *

The Chief Justice.—Why do you say that any cross-examination as to the authenticity or correctness of the copy is irrelevant.

Mr. Grant.—No question has ever arisen that the document which is attached to the August contract is the same document which Government says was not attached to the Clibborn contract. The issue with regard to the Clibborn contract was whether the July or September specification was attached to it.

The Chief Justice.—Is it not the suggestion of Government that the document which has not been produced does not bear the initials " M. B".

Mr. Grant.—My point is this, the document which the Government has not produced and which presumably in view of the questions put by the Advocate-General does not contain Mr. Brown's signature and initials, was in no way relevant to the issue before their Lordships as to what was attached to the Clibborn contract. I say the learned Advocate-General's questions were directed towards the impeaching of Mr. Weston's credit. Now I take it that the Advocate-General considers himself governed by Sections 146, 147, 148 and 149 of the Evidence Act.

[Here Mr. Grant read the sections and then referred in some detail to the questions and answers in the cross examination of Mr. Weston to show the trend of the cross examination. The following are some of the material questions with reference to HHH.]

* * *

"*Q.* The alleged date of receipt at the bottom of J 1 has "been altered. Is it your writing ?

"*A.* It is my writing. It looks like 26 altered into 27. "Probably I put it on the same date.

"*Q.* You say you put these dates at the end of July ?

"*A.* Yes.

"*Q.* Why did you put 26 first and 27 afterwards.

"*A.* I do not know. We sometimes make mistakes."

* * *

Oldfield, J.—Why will 27th be much better than the 26th ?

Mr. Grant.—I don't know.

Oldfield, J.—I cannot see it.

Mr. Grant.—I cannot explain. I do not know why the Advocate-General asked these questions. The 27th of course is the date on the specification given in the Clibborn contract.

Oldfield, J.—That is no good to them, unless they could get it to the 22nd.

Mr. Grant.—They had not made up their mind at this stage whether the office copy was going to be the 22nd or the 27th. Now what is the suggestion contained in the questions put to Mr. Weston pointing to the fact that he altered the 26th to the 27th, that the office copy was prepared on the 28th, unless it was suggested that Mr. Weston put it on for the purpose of fabricating false evidence. The questions are pointless unless it is suggested that Mr. Weston was fabricating false evidence for the purposes of this case in order to establish the identity of the document by putting the date 27th July.

The Chief Justice.—The suggestion is he altered the 26th to the 27th for the purpose of making the date correspond with the date in the Clibborn contract.

* * *

"*Q.* This date in pencil 27th July or the 26th July '09, you "wish the Court to accept as the date which identifies the specifi- "cation referred to in the Clibborn contract ?

"*A.* We have another copy that we received in August.

"*Q.* The Clibborn contract refers to a document which it "says is dated 27th July ?

"*A.* Yes.

"*Q.* Does the identification of that document rest upon this date ?

"*A.* No, it does not. It rests upon the fact that it is the "same specification which I signed in my contract on the 11th "August.

"*Court.*—What is the specification signed by you ?

"*Witness.*—It was attached to it."

* * *

" *Q.* The specification for which you have put in pencil 27th " July, is that the same specification as you refer to on the 13th " January 1910 in the 3rd paragraph of Ex. *Z* as having been " received on the 26th July ?

" *A.* It is the same specification. I wrote it without " looking up the date. I relied upon my memory.

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"*Q*. It is a mistake ?

"*A*. It should be the 27th.

"Q. In the notes of the Conference FF2 you refer to the "same document as having been received on the 28th July ?

"*A*. Yes. I had not the document before me when I "wrote the date. I was guided by my man practically."

* * *

"Q. Is Exhibit 31 the copy which you sent to England ?

"*A*. I do not know; the copy which I sent to England is "in England I suppose.

"Q. Ex. 31 (*a*) purports to be a copy of that which you "sent to England ?

"*A*. Yes. That is so. It is the copy which was furnished "to the defendant's solicitor.

"Q. Was the copy specification which you sent to London "on the 11th August made from Ex. 31.

"*A*. The copy which I sent to London was a copy of the "specification from the Public Works Department Office ?

"Q. Can you explain how it comes about that every other "copy you sent to England except HHH does not bear Mr. "Brown's signature ?

"*A*. Mr. Brown's signature was put on it."

The Chief Justice.—Where does Ex. 31 come from ?

Mr. Grant.—From the custody of the Government. It is a copy we provided the Government with before the suit. I am told that 31 (*a*) is the document we supplied the Government with after the suit. Ex. 31 is the document which was in our possession. There is no question about this.

The allegation is that the specification which I sent to London HHH was made from Ex. 31 as it is not a copy of the document which I signed on the 11th August the original of which is in the Public Works Department. That allegation is perfectly clear. I may tell your lordships that at the time he put these questions I pointed out to the Advocate-General that it was an allegation of forgery. The Advocate-General denied it. The inference which I ask your lordships to draw, and the correct inference to be drawn from the Advocate-General's cross-examination is an allegation of forgery against Mr. Weston, that Mr. Brown's initials were not in HHH.

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The Advocate-General could not have put the questions to Mr. Weston acting under instructions which upon enquiry lead him to suppose he had reasonable grounds for thinking that the imputation was true. Because if the Advocate-Ceneral thought there were reasonable grounds for believing that the imputation contained in the suggestion was true the only proper and reasonable course was to insist upon his clients the Public Works Department producing the original of HHH. The document is in their possession and I called upon the other side to produce it and they have not done it. Yet the Advocate-General attempted to cross-examine Mr. Weston as to the falsity of a document, whose falsity he could prove unquestionably by producing a document which is in his possession. I submit that is the sort of cross-examination which will not commend itself to your Lordships. If Mr. Weston was stating what was in fact a monstrous untruth, the simplest way of proving it was to produce the document. I submit the non-production of the document was sufficient ground for the Advocate-General to believe and to know that he could not have believed that the imputations contained in those questions were true Your lordships will find at page 80 book 3 an admission by the Advocate-General in these terms :—"His Lordship asked the Advocate-General whether his case was that it was another specification which was referred to in the agreement. The Advocate-General said he would accept J.1 as the specification referred to in the agreement of the 11th August." Your Lordships may take it from me that HHH was identical in terms with J & J 1. What was his purpose in putting these questions as to the date unless it was to attack Mr. Weston's credit with a view to show that he put the date and initials in the document in order to give the document an identity which it did not bear to connect it with the Clibborn contract. Having made the imputation of forgery against Mr. Weston it was their duty either to substantiate it or to withdraw it. That is the view I have taken and that is the view which I ask your lordships to take. As I told the Advocate-General more than once this is not a personal matter. I consider it a very serious attack for any Counsel, much more the Advocate-General to make a charge of this kind against a person of Mr. Weston's position.

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The Advocate-General.—Your Lordships have listened with great patience to my learned friend. Let me take him where he began and with reference to what he has been good enough to say about me, I assure him, I feel no ill-will whatever, and that when once this episode is closed my friend and I will be even better friends than we have been before. But I cannot but regret that there is no note of apology, no tone of regret, in the attack which he thought fit to make on the leader of the Bar. In order that my learned friend may substantiate his complaint he has to show, in the first place, that the questions were irrelevant. There is nothing in the position of Mr. Westen which places him above the trials of cross-examination. My learned friend spoke of him as if he were sacrosanct, Pandara sannadhi, a person who need not come to court and who if he comes should be given a seat in the front row. Your Lordships must direct your attention to the question whether the matter was relevant—relevant not as my learned friend said to the issue—but to the "suit or proceeding" which are the words in the Act. My learned friend read to your lordships two extracts from Mr. Weston's evidence which puts it beyond question that Ex. HHH.—

Oldfield, J.—(interrupting). It will be of great assistance if before you begin commenting, you will tell us what the point was you were trying to make in the question ?

The Advocate-General.—My questions speak for themselves. " How do you account for the fact that one copy contains Mr. Brown's signature while the other does not " It is a perfectly innocent question.

Oldfield, J.—Unless it was intended to build up some position. What was the position you were trying to build up.

The Advocate-General.—That is going back into the merits of the case. I cannot furnish this kind of explanation without travelling back to what has been closed. The contention of the defendants was that the specification referred to was dated the 22nd July. These are my instructions.

The Chief Justice—You mean that was your case.

The Advocate-General.—The specification the Government had in hand was one of the 22nd July eventually issued on the 20th September. Therefore it became important to test Mr. Weston's memory as to the date of specification he was putting forward.

How, did the date 27th July, come into the Clibborn agreement at all? Therefore he had altered the date of receipt 26th July to 27th July, the date of the specification referred to in the Clibborn contract. That was why he was confronted with his own letter which referred to the specification having been received at one time on the 26th July, and at another time on the 28th July. That was why these questions were put as to the date of the actual receipt.

* * *

Oldfield, J.—The whole thing is as regards the specification referred to in the agreement of the 11th August. Then I understand you gave the point up and said you will accept J 1 as the specification of the 11th August.

The Advocate-General.—As being the same as the one which was in the contemplation of the parties on the 11th August. My instructions are that Mr. Brown never signed any specification at all.

The Chief Justice.—Why not produce it.

The Advocate-General—How could I produce something that was not signed and did not exist.

The Chief Justice.—You say you have no document corresponding to the document sent by Mr. Weston to London?

The Advocate-General.—With the signature corresponding certainly not. Your lordships will see Ex. 31. This is the document of the 11th August, 1909. Copy received from the Solicitors on the other side purporting to be a copy of the same document and there is no signature of Mr. Brown at the end.

The Chief Justice.—Brown's signature is not in this document.

The Advocate-General.—I believe it is sufficient to tell your Lordships that the questions put were on the basis of the instructions furnished to me.

Oldfield, J.—I still do not understand the effect of your admission. I do not quite know what you mean by it.

The Advocate-General.—What we were resisting was the attempt of the plaintiffs to show that we had signed certain specifications. There is no specification dated 27th July. That date was created by the other side. What I admitted was that it was not the September specification that was referred to in the

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August contract, but it was an earlier specification, the one that is referred to as the 27th July.

Oldfield, J.—You did admit the existence of the 27th July specification and in reference to that what was the point of the questions as regards the dates the 26th and the 27th. You were trying to get J 1 back to the 26th. If you said there was no specification at all on the 27th July I could understand.

The Advocate-General. —There were two points, one was whether it bore Brown's signature and the other was whether it bore the date 27th July. Our case was that the specification described as the September specification was the one contemplated by the Clibborn contract.

Oldfield, J.—Will you just tell us what the motives were in Mr. Weston's mind when he altered the 26th to the 27th ?

The Advocate-General.—The idea in our mind was.

Oldfield, J.—(Interrupting). Not in your mind, but Mr. Weston's mind, I am asking.

The Advocate-General.—All I can say is that the date 29th did not correspond with the date mentioned in the Clibborn contract and the 27th was added.

Oldfield, J.—Supposing he left it as the 26th.

The Advocate-General.—Then it would have left the whole thing in a state of flux. I think your Lordships will find my admission refers to the August contract and not to the Clibborn contract at all. The admission was made after this cross-examination.

Oldfield, J.—Do you mean by that your cross-examination was proceeding on mistaken lines.

The Advocate-General.—Not for a moment.

Oldfield, J.—I cannot follow what the point of your remark is, I am afraid.

The Chief Justice.—Is this what you say was the suggestion Mr. Advocate-General. Mr. Weston's case is that the Clibborn contract was governed by the specification bearing date 27th July. On looking through the documents some date after the 27th July he finding that the date on a specification which he says was the covering specification was 26th July and in order to bring that date in the document in conformity with the date on the Clibborn contract he altered 26th to the 27th. I am bound to put it straight to clear the difficulty shared by my learned brother.

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The Advocate-General.—I think that is the case.

The Chief Justice.—If he were minded to commit a fraud a piece of India rubber would have been of greater use.

The Advocate-General.—Possibly so my Lords. I can hand up my instructions for your Lordships to see if you like.

Mr. Grant.—I have no objection to that.

The Chief Justice.—I would rather not see them.

The Advocate-General.—That is the suggestion. My instructions were that Mr. Brown had never signed any specification and Brown was not in India on the 27th July.

The Chief Justice.—Those are your instructions.

The Advocate-General.—Those are my instructions, my Lord.

The Chief Justice.—That makes the case even more extraordinary.

The Advocate-General.—It is your Lordships who are extracting this imputation from me.

The Chief Justice.—Not at all. When you offered to hand up your instructions I said I would rather not see them.

The Advocate-General.—Take the questions as they are on record. I repudiate that it was a charge of forgery.

Mr. Grant.—If it is not forgery I fail to understand what it is.

The Advocate-General.—It might possibly come under S. 192 of the Penal Code where a document is fabricated with the intention of using it in Court, but when Ex. HHH was sent to England there was no intention of using it here so that it could not apply. Then as to the relevancy I will refer your lordships to 85 page line 2 :—

"*Q.* Will you explain how it came about that the Clerk of the P. W. D. quoted as the date of the specification the 27th July ? There is nothing on the document so far as I can see to make it 27 ?

"*A.* I presumed that he was taking the document that I had already agreed to on the 11th August which is dated 27th July

Court.—What do you refer to ?

Witness.—I refer to the specification attached to the contract which I signed on August 11th which is dated 27th July."

The Advocate-General.—Can it be suggested that questions as to character are not questions relevant to the suit or proceeding ? When I asked Mr. Weston to explain how it came about that the copy sent to England contained Mr. Brown's signature whereas the other documents, even the document sent to us by the Solicitors on the other side did not contain it, my friend put an

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interpretation of a charge of forgery on the question. He might as well have put on it an interpretation of a charge of murder.

* * *

The Chief Justice.—I am anxious not to misunderstand this case. Is it admitted by you that Mr. Weston's man made a copy ot the original document HHH, being a copy of that original document.

The Advocate-General.—I have no information on the point. If Mr. Weston says so, I have no reason to doubt it.

The Chief Justice.—In whose possession do you say is the original document of which Mr. Weston says his man made copy.

The Advocate-General.—We do not know what became of it. It ought to be in our possession. I have never seen it. He says it was a copy of J or J 1. It may be it was J or J1. It was on the table and it was copied. They are practically identical.

The Chief Justice—According to your instructions this is a matter susceptible of a simple explanation by anybody who knew the routine of the office.

The Advocate-General—I do not see that a knowledge of the routine of the office would help me. The fact is that the document was executed, as your lordships will see, with a certain degree of carelessness on both sides.

The Chief Justice.—It was either possible or not possible to substantiate the allegations made against Mr. Weston.

The Advocate-General.—The allegations against him have been made by his learned counsel!

The Chief Justice.—I mean the suggestions made against him in the cross-examination. It occurs to me it was either possible or impossible to show that these suggestions were well founded.

The Advocate-General.—Mr. Weston himself writes on the 1st August 1909, that Mr. Brown is holiday-making.

The Chief Justice.—What is your answer. The suggestions were no doubt made.

The Advocate-General.—No, my lord. No suggestion of the kind my learned friend bases his complaint on. I described it, when he made it, in the lower court as *opera bouffe*, and I am inclined to describe it so now.

The Chief Justice.—Do you suggest it was *opera bouffe*.

The Advocate-General.—Yes. It was fantastic. I ask your lordships to ask the learned Judge for a report to give your lordships jurisdiction to take notice of it. I do not want your lordships to treat my learned friend's complaint as the learned

judge did in the court below. I ask your lordships to call for a report from the learned judge

The Chief Justice.—Where is Mr. Grant's re-examination?

The Advocate-General.—On page 99.

The Cheif Justice —Look at that second question on it in "order to indicate that the original of which it is said to be a "copy was signed. "It is suggested that you were a party to "putting a signature by Mr. Brown. Were you a party to a "forgery in respect of that?"

The Advocate-General.—I say it is fantastic. I protested then against the suggestion put in that question. On two occasions before the learned judge I protested.

Oldfield, J.—Do you suggest Mr. Weston put the signature on idly?

The Advocate-General.—I gave him the opportunity of saying it was done by mistake. I gave him the opportunity of explaining.

Oldfield, J.—When it came to the argument you might say there being no explanation, the Court must suppose that the signature was put in dishonestly.

The Advocate-General.—When Colonel Clibborn gave his evidence, quite simply and plainly, to the effect that when he signed the Clibborn Contract he thought it was the July specification, I felt there was no use going on.

Oldfield, J—When you sat down after Mr. Weston's cross-examination, you sat down with some idea of what you were going to do in argument. Mr. Weston not having explained his adding this signature, the presumption was that he had done it to create a piece of evidence. It seems to me the real reasons for obtaining the answers was to base a serious charge.

The Advocate-General.—I do not know what the charge would have been.

Oldfield, J—It is perfectly possible you can charge a person with conduct which was dishonest but which was not criminal.

The Advocate-General.—As to whether J and J1 came to Mr Weston in their present shape, my learned friend has drawn your lordships' attention to the evidence of Arputhanathan at page 142. If your lordships' read that evidence carefully you will see how much assistance they receive from it. The first part of the answer is that " it was the 8th July document," the second part is " it had been filled in " and the third part is " I got a fresh document" What really happened, I defy any body to say.

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I think I have been able to satisfy your Lordships that this document was a relevant document, relevant to the suit or proceeding. Then with great submission there is an end of it, if it is relevant. It is only if it is irrelevant that all these considerations come in. In view of my instructions that Mr. Brown had never signed any specifications and that Mr Brown was not in India on the 27th July, can there be any suggestion or suspicion that I had not sufficient ground for asking the questions I did. I ask your lordships to give yourselves jurisdiction by asking the learned Judge for a report.

The Chief Justice —That is a complete answer with regard to one aspect of the case. You put these questions as you were instructed as a matter of fact that Mr. Brown was not in India—and his initials find no place in the original document. That, of course, is a complete answer as to professional conduct.

The Advocate-General :—Nobody walking about here on two legs would suggest that I put the questions off my own bat to annoy Mr. Weston. My instructions are precise as to the suspicious change in the date. My instructions were that the specification was handed or sent on the 8th July, that it never came back again and my instructions go on to discuss the way in which notes were put on the top of J1 and so on. I want your lordships to get away from the exaggerated way in which this case was dealt with. I want your lordships to deal with it in a calm way and to express your opinion one way or the other.

The Chief Justice :—It often falls to the lot of counsel to put questions on an hypothetical state of things, on the assumption that a state of things exists which he only thinks may exist, but in the present case you had not to make any hypothetical assumption as the basis of your cross-examination.

The Advocate-General.—The basis of my cross-examination was a definite instruction.

The Chief Justice.—But when the further question arose it was not a question of an hypothetical state of things. It was a fact which could have been proved in two minutes by putting the man, whose initials were said to have been dishonestly inserted, in the box to say they never were in the original document.

* * *

Oldfield, J.—Speaking for myself entirely—Your instructions left you no choice but to put the questions. I do not quite understand why after that part of the case had been abandoned, there

was no unconditional withdrawal of those charges. Do you still adhere to the suggestion that 26th was altered to 27th and the signature put on to create evidence.

The Advocate-General.—The witness has admitted that he altered the date. The facts are on record.

Oldfield, J.—When you have got it that the Clibborn contract contained the July specification, then I don't see what motive there could be for the alteration. You say the alteration was dishonest.

The Advocate-General.—When we argued the case in the Court below, and Colonel Clibborn gave his evidence, the part of the case was not pursued

Oldfield, J.—You cannot abandon it for purposes of pleading, and treat it as holding good for imputing motives.

The Advocate-General.—The question was how did you come to make the alteration. It was left there.

Oldfield, J.—You say now you had no intention of founding any argument on it at any time.

The Advocate-General.—I merely put the question and the man gave his answer. If the case proceeded on the lines on which it was originally intended to proceed, possibly we would have said that it was an unsatisfactory explanation, but no further evidence was called. It is either satisfactory or unsatisfactory according to the character of the person who reads it. I am quite sorry I cannot follow your lordship's difficulty. Shortly, I submit the questions were relevant to the suit or proceeding under section 148 and therefore do not lie open to any objection. Secondly, if they were not relevant they were covered by my instructions and by the admission of the witness. Any counsel could have asked those questions, and, as a matter of fact, they were put by the permission of the Court in further cross-examination because I was asked to prove the matter further. If the questions were irrelevant they were not only justified by my instructions but by the facts on record at the time. Your lordship will remember 10 Madras p. 28, Mr. Norton's Case. In Ex GGG Mr. Weston had stated that Brown was away holiday making. That was sufficient to support my instructions.

* * *

Oldfield, J.—(interrupting) I do not quite understand. There are two branches of argument, first that the questions were wrongly put, and second that they have been put as the basis of the case which eventually having been changed, there was no withdrawal of the suggestion which has been made. You have said very little to us about withdrawal.

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The Advocate-General.—I think the explanation I gave in the lower court is quite sufficient. Your lordships will possibly be able to judge better, if you call for a report from the learned judge as to what was said in the court below. That the suggestion was a charge of forgery I have repudiated.

* * *

Mr. Grant.—The Advocate-General has offered to show your Lordships the contents of his instructions. I am sorry your Lordships did not consent to look into them. Since after having gone so far, he has further aggravated the matter by saying that Mr. Brown was not here on the 27th July, I must offer some explanation. It was not suggested to Mr. Weston in cross-examination that Mr. Brown could not have put his initials on the 27th July because he was not here. No one knew better than Mr. Weston that Mr. Brown was not here on that date. It was simply mentioned for the purpose of prejudicing your Lordships' mind, that the fact that he was away is *prima facie* evidence that the document is a forgery. It is a most unfair method of cross-examination. We knew better than Mr. Weston that Mr. Brown was not here and was Mr. Weston likely if he intended forging the document to put Mr. Brown's signature and date at a time when the whole of the Public Works Department knew that Mr. Brown was not here? The Advocate-General's suggestion is that the so-called alterations were made to bring the July specification into line with the Clibborn contract. If that is so, it must have been done subsequent to the Clibborn contract and after it was known to Mr. Weston that this question would arise in a dispute in a Court of Law. It cannot be suggested that Mr. Weston could have supposed that before the Clibborn contract was entered into that this question would be discussed three years after in the High Court of Madras. We know that HHH was sent away on or about the 11th August 1909: Was Mr. Weston able to foreshadow the case that would come up two years afterwards?

The Chief Justice.—When do you say that Brown put his initials on the original document?

Mr Grant.—On the 11th August.

The Chief Justice.—When is he supposed not to have been in India.

Mr. Grant.—On the 27th July. I take it that the Advocate General is endeavouring to substantiate this charge of forgery against Mr. Weston. Can he suggest any reason why

Mr. Weston should have forged Mr. Brown's signature and put the date July 1909 two years before this action arose? Their case is that Mr. Weston discovered the specification bearing date 27thJuly. He finds J1, dated the 26th and he alters it to the 27th. It is unintelligible for Mr. Weston to do this in order to make it clear that it is the specification referred to in the Clibborn contract at adate subsequent. Why anticipate this difficulty in the August proceedings. I am not charging the Advocate-General with professional misconduct. I say that the Advocate-General should set the members of the Bar a better example of professional etiquette, that when you attack a person in Mr. Weston's position. if you cannot substantiate your position, the least you can do is to withdraw. I ask your Lordships to take my view.

The Chief Justice.—Any observations which we may think necessary to make with reference to this matter will be made when we deliver judgment in the Appeal.

On 17th April. When delivering judgment in the main case, their Lordships expressed the following

Opinion.-*The Cf. Justice.*-In the course of the Advocate-General's cross-examination of Mr. Weston certain suggestions were made which Mr. Grant submitted on behalf of Mr. Weston imputed dishonorable, if not dishonest, conduct to Mr. Weston. These suggestions were not substantiated and this being so, Mr. Grant on behalf of his client formally asked the Advocate General to withdraw them. The Advocate-General did not do so. We were asked by the Advocate-General and by Mr. Grant to express our opinion as to whether in the circumstances, the Advocate-General ought to have withdrawn the suggestions, One matter was in connection with the alteration of the date at the foot of Exhibit J 1. There is a pencil entry at the foot of Exhibit J 1, which, obviously, was originally July 26,and which was altered in pencil into July 27.The suggestion as to this was, so far as I understand it that July 26 was altered into July 27 so as to identify the specification which according to the plaintiff's case, was the specification referred to in the Clibborn contract. No attempt was made to convert the date as originally written. Mr. Weston said he wrote July 26 in the first instance by mistake. I see no reason to suppose that the alteration, or correction, which Mr. Weston admits he made, was made with any similar or dishonest intention. It seems to me a matter of small importance and I am not prepared to say that it was the duty of the Advocate-General for really to withdraw any imputation which he intended to convey in connection with the alteration of July

In re Messrs. Crompton & Co. *v.* Secretary of State for India.

White C. J.

26th into July 27th. The other matter to which Mr. Grant thought it necessary to call our attention seems to me to be more serious.

It would seem that the original of the specification with reference to which the contract of August 11th (Exhibit R) was signed should be in the possession of Government. This document has not been produced. Mr Weston sent a copy of this specification to his London office. Exhibit H H H is a copy of the document sent to England. In the copy the letters M. B. (the initials of Mr. Brown) appear under date 11th August 1909, the date of the formal contract (Exhibit K). The suggestion made in the cross-examination of Mr. Weston, as I understand it, was that he was a party to adding these initials to the copy knowing they did not appear in the original document. TheAdvocate-General was of course cross-examining on specific instructions.

In re-examination Mr. Grant put it to the witness "It is suggested that you were a party to putting a signature on (the copy sent to England) in order to indicate that the original of which it is said to be a copy was signed by Mr. Brown. Were you a party to a forgery in respect of that?" The witness's answer was "Certainly not". Mr. Grant's version, put in re-examination of the imputation which he said the Advocate-General made on his client was not repudiated by the Advocate-General. The imputation, I suppose, is that Mr. Weston sought to manufacture evidence in the plaintiff's favor by adding words to a copy of a document which he sent to his principals in England, which to his knowledge the original document did not contain. That of course, is a very serious charge. It may or may not be criminal. It is certainly dishonest. The Advocate-General was not prepared to carry the matter further either by producing the original document or by putting Mr. Brown into the box. In these circumstances Mr. Grant says the Advocate-General ought to have withdrawn the imputation. This raises a question of the Ethics of Cross-examination of some delicacy and difficulty. My own view is (we have no authority in the matter and it is only my "pious opinion") that in all the circumstances and having regard to the character of the litigation and the parties to the suit the imputation ought to have been withdrawn. I should not have thought it necessary to say anything about this incident if we had not been expressly asked both by the Advocate-General and by Mr. Grant to make some statement on the subject.

Oldfield, J.—I concur in this expression of opinion.

Srinivasa Aiyangar v. Cunniappa Chetty.

Sankaran Nair J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

In its Ordinary Original Civil Jurisdiction.

Present:—Mr. Justice Sankaran Nair.

V. V. Srinivasa Aiyangar (*Receiver*) *Plaintiff*. *

v.

V. Cunniappa Chetty and others *Defendants*.

Letters Patent cl 12—Jurisdiction—Suit for land—Claim for damages for trees cut—Test—Determination of title so as to preclude its being raised in another suit—Original Side,—Practice—Counsel's fees—When instructed by party and by Vakil.

Where, on the allegations in the plaint, title to land has to be determined either expressly or by implication so as to preclude it from being raised in any subsequent suit, the suit is one for land within the meaning of cl 12 of the Letters Patent.

Held, accordingly that a suit for the recovery of damages for trees cut and carried away from the plaintiff's casuarina plantation was a suit for land within the meaning of that article.

Where Counsel appears instructed by the party in person, the latter is entitled to claim as part of the costs decreed to him the reasonable fee paid to his counsel. Where Counsel is instructed by a Vakil, the Taxing Officer or the Court may certify for his fee in which case it will be recoverable in addition to the *ad-valorem* fee allowed for the Vakil.

C. P. Ramasami Aiyar for Plaintiff.

M. A. Thirunarayana Chari instructed by *V. Parthasarathi Aiyangar, Pattabhirama Aiyar* and *Visvanatha Sastri* for Defendants.

The Hon'ble the Advocate-General on behalf of the Bar.

J. Krishna Row for the Bar Association and *Chamier* for Attorneys Association.

The Court delivered the following

Judgment:—A preliminary objection is taken as to the jurisdiction of this Court. It is first objected that the 3rd defendant does not live or carry on business in Madras and therefore the suit so far as he is concerned should be dismissed. Evidence has been taken on this point and I am of opinion that the suit is properly brought against the 3rd defendant.

Original Side Rules—O. XVII, R. 191. If costs were awarded, and unless otherwise ordered by the Court, the award of the costs of the suit or order, as the case may be, shall be inserted in the decree or order, followed by the words "when taxed and noted in the margin thereof," and the Registrar shall, upon production of the allocatur of the Taxing Officer, insert the amount of costs accordingly (which shall bear interest at the rate of 6 per cent. per annum from the date of taxation until payment). Provided always, that no costs shall be so noted after one year from the date of the decree or order without the order of the Court, to be obtained upon summons in chambers, and after notice to the order side.

O. XXXVIII, R. 533. An advocate may appear and plead upon all proceedings in Court or in chambers; provided that the taxing officer shall not, as

* O. S. No. 448 of 1912. 31st March, 1914.

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The evidence shows that he comes here to sell his casuarina trees and whenever he has any business to transact in Madras with reference to those trees he comes to Madras. Suits have been brought here against him and he has been arrested on warrants issued against him in Madras. I accordingly overrule the objection so far as the 3rd defendant is concerned.

The more difficult question that remains is whether the suit is one for land within the meaning of those words as used in S. 12 of the Madras Letters Patent. The suit is brought for the recovery of damages for trees cut and removed by the defendants. They are said to be trees in a plantation situated outside the limits of the ordinary original civil jurisdiction of this Court and the plaintiff's case is that this plantation wherein the trees stood is vested in him. The jurisdiction of this Court has to be determined on the facts alleged in the plaint. Now it is true no doubt that no relief with reference to the land is claimed, the only relief claimed being the recovery of a certain sum of money. But the plaintiff cannot obtain that relief without proving his title to the land and an averment made in the plaint that the land belongs to him is necessary. If the title to the land is denied, then, of course, evidence has to be given to prove his title. If it is admitted by the defendants, then it is unnecessary to decide the question of title; but in any subsequent suit between the parties the question of title to this land cannot be raised again. Either, therefore, by express decision or by implication the title

between party and party, allow any fee in respect of his attendance at chambers or at the first hearing of a suit, unless the judge certifies that the case is a proper one for the attendance of an Advocate.

An Attorney may appear, plead and act upon all proceedings, provided that he shall not be allowed to appear or plead upon a hearing in Court.

A Vakil may appear, plead and act upon all proceedings whether in Court or in chambers.

High Court Fees Rules.—O. IV, R. 29, As between party and party, no costs shall be allowed which do not appear to the Taxing Officer to have been necessary and proper for the conduct of the case, or for defending the rights of the party, or which appear to the Taxing Officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

Vakils Fees " O. VI, R. 68. The fees to be allowed to the Vakils of the High Court shall be calculated according to the scales of fees prescribed by, and otherwise in accordance with, the rules now regulating the remuneration of pleaders on the Appellate Side of the High Court and in Courts subordinate thereto, being Rules 30 to 40 inclusive, of the rules made by the High Court under the Legal Practitioners' Act, 1879, as from time to time amended."

to the land has to be declared in this suit and the matter becomes *res judicata.* Now, it appears to me that where on the allegation in the plaint the title to a land has to be determined either expressly or by implication so as to preclude it from being raised in any subsequent suit, the suit is one for land within the meaning of the words in S. 12 of the Letters Patent. Mr. Ramasami Aiyar relied upon the decision of this Court in *Marappa Mudali* v. *S. T. McCarthy* [1] and upon the decision in *Pattangowda* v. *Nilkant Lal Deshpande* [2] in which it was decided that when a suit is brought in a Small Cause Court for the recovery of a certain sum of money and the plaintiff has to prove his title to any land in that suit then the title to the land comes only incidentally before the court and the Small Cause Court is not divested of its jurisdiction to try that suit. That may be so. But the ground of these decisions is that the title to the land will not be *res judicata* in any subsequent litigation between the parties and when the title will not be *res judicata* between the parties it cannot be said that the question of title is properly before the court for determination. I am therefore of opinion that the suit is one for land, and it is conceded that if the suit is one for land it will not lie in this court. I accordingly dismiss the suit. As the 3rd defendant's plea is disallowed. I make no order as to his costs. The plaintiff will pay the costs of defendants 1 and 2.

Mr. Tirunarayanachariyar applies for a certificate for counsel's fee. Mr. Ramsami Aiyar opposes this on the ground that no counsel's fee can be taxed in any case where he is instructed by a Vakil. Mr. Chamier supports him. The question has been argued earnestly for one entire day. I shall therefore give my reasons for my conclusion.

When a party is declared entitled to his costs, he is *prima facie* entitled to receive all the reasonable costs incurred by him in the conduct of the suit. The fee that he might have paid to a Counsel, Attorney or Vakil is included in his costs; but such fees, of course, should not be unreasonable.

The rule for taxation of costs therefore provides that when a party instructs an attorney, the attorney's fees are to be taxed according to the scales in Appendix IV of the Original Side Rules. As an attorney cannot plead, it is necessary for him to instruct a

1. (1881) I. L. R 3 M 192. (1913) I. L. R. 37 B. 675.

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counsel, and therefore it is only right that a party should get the attorney's fees as well as the fees which were paid to counsel by the attorney on his behalf, and as it is the attorney who pays the counsel whom he instructs, counsel's fee is included in his bill of costs. But as it is necessary for an attorney only to instruct one counsel in the conduct of the case, if he instructs also another counsel, then he is not entitled to get that fee as a matter of right. It is open to the Taxing officer not to allow it. It is also open to him to say under R. 29 of the High Court Fees Rules that it was necessary and proper that a second counsel should be engaged in the case; then he can allow the second counsel's fee. Of course, the Judge can always certify for such counsel's fee.

Where a party appears by a Vakil, Vakil's fees are fixed by O. VI, R. 63 of the High Court Fees Rules, and the amount of such fee is calculated where practicable according to the value of the suit and the amount fixed by the scale of fees framed under the Legal Practitioners' Act, 1879. For the same reason that a second counsel's fee is not always allowed, it is only reasonable that when counsel appears instructed by a Vakil the counsel's fee should not be allowed as a matter of course. A Vakil can conduct the case alone. He can act and appear and plead, and therefore there is no necessity for him to engage a counsel. He can do the work which an attorney and counsel together can do when a party appears by an attorney. But those reasons which influence the Court or the Taxing officer to certify for second counsel's fee would seem to be also applicable to cases in which a Vakil instructs a Counsel. They would seem to apply with greater force, as it might be said that cases which required a second counsel would *a fortiori* seem to require a counsel when a party instructs a vakil instead of an attorney. This principle is followed in R. 533 of the Original Side Rules which allows the Taxing Officer to allow counsel's fee in respect of his attendance at Chambers or at the first hearing of a suit when the Judge certifies that the case is a proper case for his attendance. The rule is not limited to cases in which the Advocate appears instructed by an attorney.

It was then argued before me that a party is not entitled to claim as part of his costs, fee paid by him to counsel whom he

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instructs directly without the intervention of an attorney or whom a Vakil instructs, because the rules about payment of fees when a party appears by an attorney go to show that a party can claim the fee paid to counsel only when the counsel appears instructed by an attorney; and the rules about payment of costs when a counsel appears instructed by a Vakil go to show that no counsel's fee can be allowed. The argument is that in attorney's cases when costs are awarded under R. 191 they must be inserted in the decree followed by the words "when taxed and noted in the margin thereof," and taxation of costs can only take place as provided by O. IV which requires an attorney to present his bill of costs in which the fee paid to counsel must be entered. There is no provision relating to payment of counsel's fee, and it is argued, therefore, that it is only in cases in which an attorney may be able to present his bill of costs, and therefore cases in which an attorney appears that counsel's fee can be awarded to the successful party. In my opinion, those who put forward these arguments forget that rules for taxation of costs only prescribe the procedure for recover of costs and the conditions subject to which they might be recovered. The right to recover costs, and fees as part of costs, exists apart from the rules for taxation of costs. They cannot be intended or read to get rid of the right the existence of which is a pre-requisite to the taxation rules coming into operation. Moreover, they were framed at a time when it was not the practice for Counsel to appear instructed by a party or Vakil. The rules, therefore, had not such cases in contemplation; and the rules which were framed to provide for payment of costs when a counsel appears instructed by an Attorney cannot be construed to impose a restriction even indirectly by disallowance of fees upon counsel appearing instructed by a party or a vakil—a matter which was never contemplated by those rules. Again on the question whether any rules can fetter a judge in his judgment, I express no opinion; but it certainly cannot be done by implication, and in express terms his power to award costs as prayed for is not taken away.

Coming to the rules, it may be pointed out the argument that a party represented by Counsel should not get the fees that he might have paid to him included in his costs, on the face of it, would seem to be unreasonable. It has been held by

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Mr. Justice Wallis, and I agree with his conclusion, that it is open to a counsel to appear instructed by his client; and if that is so, it appears to me that he is entitled to get as part of the costs awarded to him the fee that he has paid to his counsel. Otherwise, it would amount to the virtual prohibition of a party engaging a Counsel and the courts will undoubtedly struggle against a construction of the rules which has that result.

Now taking the rule about attorney's bill of costs, R. 191 states that the procedure therein prescribed should be followed '*unless otherwise ordered by the Court*;' and an order certifying for counsel's fee is such an order if it is inconsistent with that rule. R. 63 about Vakil's fee states clearly that it applies to fees "to be allowed to the Vakils." Reading it with the rules 30 to 40 of the Appellate Side Rules, I have no doubt that it only means that a Vakil cannot claim anything more for appearing, acting or pleading up to the date of the decree. It may also be pointed out that if R. 41 of the Appellate Side Rules applies it can only operate when *ad valorem* fees are paid and the argument to help the plaintiff in this case must cover other cases. Liberally construed, it would prevent higher costs being awarded when a party is represented by counsel and attorney.

If I am right in my interpretation of R. 533, that also is against this view, as counsel may appear instructed by a Vakil who may claim as part of the costs the fee paid to the counsel. It was contended that this rule must be read subject to R. 191 and O. IV; but in my opinion all these rules have to be read together and they certainly are not to be strained to include cases which were not in the contemplation of those who framed the rules.

I am therefore of opinion that when counsel is instructed by the party in person the latter is entitled to claim as part of the costs decreed to him, the reasonable fee paid to his counsel, and when he is instructed by a Vakil the Taxing Officer or Judge may certify for his fee.

Certified accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Mr. Justice Ayling.

Vannavalli Seshagiri Row ... *Petitioner in* C. R. P. No. 312 J. 1913.

v.

Pammela Amenayya Sastrulu *Petitioner in C. R. P. No.* 318 of 1913.

v.

Gopisetti Narayanaswami Naidu Receiver, Medur Estate of Ellore *Respondent in C. R. P. Nos.* 312 *and* 313 *of* 1913.

Suits Valuation Act, S 8—Court Fees Act, S. 7 cl. (XI)—Valuation for jurisdiction, same as for Court Fees.

Having regard to S. 8 of the Suits Valuation Act, valuation of a suit falling within cl (xi) of S. 7 of the Court Fees act is the same for purposes of jurisdiction as for Court fees.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Kistna in Mis. Appeal. Nos. 6 and 7 of 1912 preferred against the order of the Courtof the Subordinate Judge of Ellore in O. S. Nos. 18 and 16 of 1911 respectively.

The Hon'ble. Mr. B. N. Sarma for Petitioner.

Mr. P. Nagabhushanam for the Respondents.

The Court delivered the following

Judgment:—The only question for disposal is as to the correct valuation of the suit for purposes of jurisdiction. The District Judge has held that it is governed by S. 14 of the Madras Civil Courts Act; for the petitioner it is argued that the Subordinate Judge was right in applying S. 8 of the Suits Valuation Act (VII of 1887).

The ruling relied on by the District Judge (*Chalasamy Ramiah* v. *Chalasamy Ramasami* [1] (does not in my opinion afford any support for his view that the present suit is one of which the subject matter is land so as to bring it within the scope of S. 14 of the Madras Civil Courts Act (III of 1873) and that this section governs the valuation for purposes of jurisdiction. At the time when the latter Act was passed, the wording and arrangement of S. 7 of the Court Fees Act was such that it was at any rate open to argument that a suit of this kind

C. R. P. Nos. 312 and 313 of 1913. 20th April 1914.

1. (1912) M. L. T. 155.

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brought by the landlord to evict a tenant was for the possession of land and fell under clause (v). If so, it was probably meant to be covered by S. 14 of Act III of 1873. Assuming that this was so and that a suit like the present one fell under clause (v) of S. 7 as that section originally stood, the enactment of Act VII of 1887 made no difference for such a suit would be excluded from S. 8 of the same. But a very important change was effected by Act VI of 1905. This Act amended the Court Fees Act by introducing in clause (xi) of S. 7 a new category of suit "(*cc*) for the recovery of immoveable property from a tenant."

The present suit undoubtedly falls under this category: and although Respondent's vakil may be right in contending that, before the Amending Act, it fell under clause (V), the effect of the amendment was clearly to take it out of clause (V) (if it were even there) and put it into clause (XI) (*cc*). The indirect effect of the amendment would then be to enlarge the scope of S. 8 of Act VII of 1887 which applies to all suits other than those referred to in S. 7, clauses (V) (VI), (IX) and (X) (*d*) of the Court Fees Act. It certainly cannot be contended now that this suit is not covered by S. 8 of the Suits Valuation Act. Whether this effect was intentional or due to inadvertance may be a matter of speculation but is of no importance. The Acts must be construed as they stand.

Adopting the most favourable view for Respondent *viz.*, that section 14 of the Madras Civil Court's Act at the time of its enactment was intended to cover a case of this kind, in the event of conflict, I think preference must be given to S. 8 of the Suits Valuation Act as the later enactment S. 14 of the Madras Civil Courts Act is referred to in the Suits Valuation Act, but I find nothing to indicate that S. 8 should be read subject to its provisions.

I must therefore set aside the order of the District Judge and restore that of the Subordinate Judge. The Petitioner will get his costs in this and the District Court from Respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

A. L. A. R. R. M. Arunachellam ... *Appellants** (*Plaintiffs.*)
Chettiar and others

v.

M. Muthayanai Thaven ... *Respondents* (*Defendants*)

Estates Land Act, Ss. 4, 27—Payment of rent on the basis of the cultivated area—Custom not illegal.

S. 4 of the Estates Land Act should be read subject to the provisions of S. 27 and a custom of paying rent on the basis of only the cultivated area in the holding is not illegal.

Second appeal from the decree of the District Court of Ramnad at Madura in A. S. No. 851 of 1911 preferred against the decree of the Court of the Sub-Collector of Ramnad in S. A. No. 760 of 1911.

S. Sundara Raja Aiyangar for Appellant.

T. Vardeppa Naikar for Respondent.

The Court delivered the following

Judgment:—We think that S. 4 of the Estates Land Act must be read subject to the provisions of S. 27 which states that the amount of rent must be presumed to be affected by the conditions which appertained to the holding in the preceding revenue year.

But the Lower Courts found that by immemorial custom of the conditions appertaining to the holdings in the plaint Mittah is that no rent should be charged for lands left fallow, in other words, the rent for the whole holding in any particular fasli should be calculated only on the cultivated area. We think that condition is not against the statutory provision in S. 4 of the Estates Land Act as S. 4 by its opening clause saves such and similar conditions. Our view, we think is supported by the judgment of this Court in S. A. 2034 of 1900. We therefore dismiss this second appeal (the plaintiffs Mittadars being the second appellants before us) with costs.

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* S. A. No. 1375 of 1912. 21st August 1913.

Nanjaya Mudali v. Shanmuga Mudali.
Sankaran Nair J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

Nanjaya Mudali and another — *1st and 2nd Defendants *Appellants.*

v.

Shanmuga Mudali and others — ***Plaintiff and Defendants Nos. 3 to 9—Respondents.***

Alienation—Joint family—Alienation by member—Whether alienee tenant-in-common—Outcaste—Exclusion.

The 3rd defendant one of five coparceners conveyed to the predecessor in title of the 1st defendant, his 1/5th share in the family properties by Exhibit I in 1891. Subsequently two of the coparceners died and the 3rd defendant in 1904 conveyed by Exhibit A, his interest in the family properties to the plaintiff. Plaintiff brought the present suit for recovery of the share conveyed. The defence was that the 3rd defendant by the execution of Exhibit I ceased to be coparcener and that plaintiff obtained nothing under Exhibit A.

Held that

Where a member of a joint Hindu family alienates his share, the alienee does not become thereby a tenant-in-common with the other co-parceners, he can only enforce his right by partition

The alienor remains a member of the coparcenary and his share fluctuates according as there are births and deaths subsequent to the alienation.

Where a member of a joint Hindu family become an outcaste and is excluded from enjoyment of the property for more than 12 years, his right in the family property becomes extinguished and he cannot subsequently alienate the property.

Sreenivasa Sundara Thathachariar v. *Krishnaswami Iyengar* (1) *Subba Rao* v. *Anantanarayana Iyer* (2) *not followed Venkatarama* v. *Meera Labai* (3) *Palani Konan* v. *Masa Konan* (4). *Deendyal Lal* v. *Jugdup Narain Singh* (5) *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (*P. C.*) (6) *Hardi Narain Sahu* v. *Rudei Perkash Misser* (7) *Ramkishore Kedarnath* v. *Ram Rachpal* (8) *ref.*.

Second Appeal from the decree of the Court of the Subordinate Judge of Madura East in Appeal Suit No. 172 of 1909, preferred against the decree of the Court of the District Munsif of Dindigul in O. S. No. 642 of 1906.

K. B. Ranganadha Aiyar for Appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswamy Aiyar* for Respondents.

The Court delivered the following

Judgments:—*Sankaran Nair J*:—The 3rd defendant, a member of a Hindu family, conveyed his one-fifth share in certain joint family properties in 1891 by Exhibit I. That interest

* 5th December 1913. — S. A. No. 161 of 1911

1 (1912) 11 M. L. T. 312.
2. (1912) 23 M. L. J. 61.
3. (1889) I. L. R. 13 M. 275.
4. (1896) I. L. R. 20 M. 243.
5. (1877) L. R. 4 I. A. 247.
6. (1878) I. L. R. 5 C. 148.
7. (1883) I. L. R. 10 C. 626.
8. (1913) 14 M. L. T. 168.

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has now vested in the 1st defendant, his father. Two of his brothers died, and in 1904 the 3rd defendant again transferred all his interest by Exhibit A. At that time, on the footing that he was a co-parcener, his interest amounted to one-thrid. The plaintiff has acquired the rights conveyed by Exhibit A and he now seeks to recover possession.

The Subordinate Judge has held that the plaintiff is entitled to a two-fifteenths share of the properties, that is the difference between one-third and one-fifth and this is an appeal against that decision.

The first question that is argued before us is that by the transfer in 1894 the joint tenancy was put an end to and the 3rd defendant's first alienee became a tenant in common with the other co-parceners so far as the property was concerned and that therefore by the death of the other co-parceners no interest accrued to him by survivorship; and for this the decisions of *Benson and Miller JJ.* in *Srinivasa Sundara Thathachariar* v. *Krishnaswami Aiyangar* [1] and of *Benson and Sundara Aiyar, JJ.* in *Subba Row* v. *Anantanarayana Aiyar* [2] are relied upon. These Judgments follow the opinion of *Krishnaswami Aiyar J.* in *Chinnu Pillai* v. *Kalimuthu Chetti* [3].

It is argued before us that these decisions are not sound and that the alienation of a co-parcener's interest in a portion of a joint family property does not make the alienee a tenant in common with the other co-parceners in the property so alienated. On principle it is difficult to support the proposition.

When a co-parcener alienates his share in certain specific family property, the alienee does not acquire any interest in that property. He can only enforce his rights in a suit for partition. In dividing the family properties the court will, no doubt, set apart for the alienating co-parcener's share the property alienated if that can be done without any injustice to the other co-parceners, and such property, if it is so set apart, may be given to the alienee as the transferee of such co-parcener. But this is only an equity and the alienee is not, as of right, entitled to have the property so allotted. If such property is not so set apart, then the alienee would be entitled to recover that property which was allotted to his vendor for his share, though it may not be the property that was alienated to him so far as he is concerned.

1. (1912) 11 M. L. T. 312; 15 I. C. 854.
2. (1912) 23 M. L. J. 64. 3. (1910) I. L. R. 35 M. 47.

Nanjaya Mudali v. Shanmuga Mudali.

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This law has been and repeatedly laid down in various cases by the other High Courts also. (See *Hem Chander Ghose* v. *Thako Moni Debi* [1], *Amulak Ram* v. *Chandan Singh* [2], *Narayan Bin Babaji* v. *Nathaji Durgaji* [3]. *Pandurang Anandrav* v. *Bhasker Shadashiv* [4] *Udaram Sitaram* v. *RanuPanduji* and *Venku Panduji* [5].

This, of course, is inconsistent with the view that the alienee acquires any interest in any specific property. The co-parcener who alienated has himself no such interest. It is difficult to see therefore, how the alienee could acquire such an interest.

For the same reasons, it has been held by this Court that an alienee cannot sue for partition and allotment to him of his share of the property alienated, (See *Venkatarama* v. *Meera Labbai* [6] and *Palani Konan* v. *Masakonan* [7], This again is inconsistent with the view that a purchaser becomes a tenant in common with the orders in the specific property alienated. They have not been overruled or dissented from and are inconsistent with the cases above cited relied upon by the appellants.

In *Deendyal Lal* v. *Jugdeep Narain Singh* [8] a suit was brought by a son to recover the property sold in execution of a decree against his father. The Subordinate Judge passed a decree for a moiety of the family property claimed. That decrée was reversed by the Appellate Court which dismissed the suit. The High Court, however, gave the plaintiff possession of the whole of the property, not merely the plaintiff's share. In appeal before the Privy Council, their Lordships laid down the position of a purchaser in the following words :—" It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu Estate; and that it may be so applied without unduly interfering with the peculiar status and rights of the co-parceners in such an estate, *if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.*" In accordance with such declaration, they held that the decree which awarded possession of the joint family property was right, but they added a declaration that the purchaser was entitled to take proceedings to have his alienor's share and

1. (1893) I. L. R 20 C. 533.
2. (1902) I. L. . 24 A. 483.
3. (1903) I. L. R. 28 B. 201.
4. (1871) 11. Bom. H. C. R. 72.
5. (1875) 11. Bom. H. C. R 76.
6. (1889) I. L. R. 13 M 275.
7. (1896) I. L. R. 20 M. 243.
8. (1877) L. R. 4 I. A. 247.

interest ascertained by partition; this was the principle which was subsequently acted upon by their Lordships.

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In *Suraj Bunsi Kœr's case* [1] their Lordships passed a decree confirming co-parceners in their possession of the joint family property including the share of the alienor subject to such proceedings as the alienee might take to ascertain the share that he obtained by means of partition. The decree assumed that till such partition the alienee did not acquire any right to possession. (*Suraj Bunsi Koer* v. *Sheo Prasad Singh* [1].) In the judgment of the Privy Council reported in *Hardi Narainsahu* v. *Ruder Perkash Misser* [2] their Lordships decided that in similar cases where the alienee has got possession of the property he should be turned out of possession of the whole of the property and that the other co-parceners should recover posssession of the same subject to a declaration that the alienee is entitled to demand a partition of the share of the alienor.

The decisions negative any right of the alienee to possession and his status as a tenant in common although he might have obtained possession of the property in execution of a decree against one of the co-parceners.

So far as Madras is concerned, there is no distinction in this respect between the rights of a purchaser in execution of a decree and by private alienation; and in *Ramkishore Kedarnath* v. *Ramrachhpal* [3], which is a recent case of private alienation, the Judicial Committee pointed out that the members of a family who were not bound by the alienation were entitled to recover possession of the entire property as they were entitled to it as joint family property and desired to enjoy it as such. They also pointed out that in a suit for such possession it may be open to the Court to make the whole or any part of the relief granted to them conditional on their assenting to a partition, so far as regards the alienor's interest in the estate, so as to give effect to any right which the alienee may be entitled to, claiming through the alienor. The two Madras cases above referred to as well as these Privy Council decisions do not seem to have been considered by the learned Judges in arriving at the conclusion that the alienee becomes a tenant-in-common of the portion of the joint family

1. (1879) I. L. R. 5 C. 148. 2. (1883) I. L. R. 10 C. 626.
3. (1913) 14 M. L. T. 168.

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property aliented. The decisions of the other High Courts cited by *Krishnaswamy Aiyar J.* if opposed to these decisions, cannot be followed nor has the decision of the Full Bench in I. L. R. 35 M. 47 anything to do with the case. It only détermined the time for ascertaining the alienating co-parcener's share which passed to the purchaser. I am accordingly unable to follow the decisions relied upon by the appellants.

The other question is whether the interest of the 3rd defendant has been lost by prescription. It is found that he became an outcaste in 1891. It is also found that he was driven out of the family and that he did not enjoy the family properties. This is clearly exclusion, and as twelve years have elapsed since the date of exclusion, it appears to me that he had lost all his interest in the joint family property and that therefore the plaintiff did not acquire any interest under Exhibit A. The decree of the Subordinate Judge must for this reason be reversed and that of the District Munsif restored with costs in this and the Lower Appellate Court.

Bakewell, J :—I have had the advantage of reading the judgment which my learned brother has just delivered and I entirely concur therein; since, however, we are differing from learned Judges of this court for whose opinion I have the highest respect I think that I should also state my reasons.

The historical development of the law relating to the property of the joint Hindu family whereby a member of the family has obtained a power of disposing of his interest in the joint property, is well described by Mr. Mayne in his book on Hindu Law (paragraphs 353 to 360) and he shows that this power is contrary to the theory of the ancient Mitakshara law and is due to modern ideas and is the creature of judicial decisions.

It is clear that an ordinary member of a family cannot convey to his alienee a larger interest in the joint property than he himself possesses, and it is desirable to consider shortly the nature of that interest. It is not strictly comparable to any interest under any other branch of the law of property or of contract, still less can it be compared to joint tenancy or tenancy-in-common under the law of England. In *Appovier* v. *Rama Subba Aiyar* [1], Lord Westbury states that " according to the

1 (1866) 11 M. I. A. 75.

true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular individual, has a certain definite share"; and, when he speaks of the severance of a joint tenancy and its conversion into a tenancy in common, he is careful to point out that he uses the language of the English law merely by way of illustration. With all respect, I think that the learned Judges from whom we are differing by using these terms, have imported from the English law some of the ideas which they connote.

If, in order to describe the development of this branch of law, it be permissible to compare it with another branch of law, I would prefer to use the law of partnership rather than the English law of property, in the same manner in which it was used by their Lordships of the Privy Council in *Deendyal's case* [1]. A member of a joint family cannot any more than a partner, introduce a stranger into the community, he cannot for his own benefit alienate or deliver to a stranger a particular portion of the common property, and he cannot obtain his share of that property without winding up the concern; and his interest is, therefore, a right to a share of the general assets after the common liabilities have been discharged, and not a right to a share of any specific property of the family. It has accordingly been frequently held that his remedy is a suit for the partition of the whole of the property, and not of specific property as is pointed out by *Sundara Aiyar J.* in *Narayanaswami Naidu Garu* v. *Tirumalasetti Subbayya* [2].

I must respectfully dissent from the dicta of the same learned Judge in *Subba Row* v. *Anantanarayana Aiyar* [3] and of *Krishnaswami Aiyar J* in *Iburamasa Rowthen* v. *Theruvenkatasami Naik* [4] that the question whether a suit for general or for partial partition will lie, is "one relating to processual law and must be decided not according to any rule of Hindu law but according to the principles of Civil Procedure." A suit for an account of the property of an undivided family and an enquiry as to its liabilities, that is for general partition, is necessitated by the nature of the interests of the plaintiff and his co-parceners; the circumstances of a particular case may enable this procedure to be dispensed with,

1. (1377) L. R. 4 I. A. 247 at 255.
2. (1912) 24 M. L. J 80.
3. (1912) 23 M. L. J. 70.
4. (1910) 34 M 269.

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but the general rule remains that each co-parcener may ask that it should be followed. It has been clearly laid down by their Lordships of the Privy Council that the purchaser of the interest of a co-sharer in a joint family estate under a sale in execution of a decree, or under a voluntary sale in the Madras Presidency, stands in the shoes of the co-sharer, and acquires the right as against the other co-sharers to compel a partition (*Deendyal's case*); the interest which is purchased is not the share at that time in the property, but is the right which the alienor would have to a partition, and what would come to him upon the partition being made (*Hardi Narain* v. *Ruder Perkash* [1].) "The law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition." (*Suraj Bunsi Koer* v. *Sheo Persad Singh* [2].) It has been held that this right is not determined by the death of the alienor before partition, (*ibid*), and that the quantum of interest transferred must be taken as that of the alienor at the date of the assignment (*Chinnu Pillai* v. *Kalimuthu Chetti* [3] but there appears to be no reason why the transferor should not by appropriate words convey all such rights as he may possess, whether vested or contingent upon the death of another co-parcener in the transferor's lifetime; and the transferor obviously cannot prevent his share from being diminished by reason of the birth of a collateral co-sharer or by legitimate payments or alienations by the manager of the family. In accordance with these authorities it has been held that a purchaser of the interest, of a co-parcener must sue for a general partition of the entire family property *Iburamsa Rowthan* v. *Theruvenkatasami Naick* [4].

Since the transferee only acquires an equity to compel a partition he has only a right *in personam* and not a right *in rem* and the transferor remains a member of the family and retains all the rights which attach to membership, including the right to an increased share upon the death of another co-parcener. An alienation by a co-parcener of a particular item of the family property or of a specific share in such an item, differs in some

1. (1888) I. L. R. 10 Cal. 626
2. (1879) I. L. R. 5 Cal. 148. at 166.
3. (1910) I. L. R. 35 M. 47.
4. (1910) I. L. R. 34 M. 274.

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respects from an alienation of the whole or a fraction of the interest of the transferor in the general assets of the family. Since a member of a joint family has no right to a specific share of any particular property of that family, an assignment by him of such a share to a stranger conveys no interest whatever to the transferee; if, however, the grantor should subsequently become entitled to the property included in the grant, then on a well settled principle of equity which is embodied in S. 43 of the Transfer of Property Act, 1882, he cannot deny the title of the transferee and is bound to make the grant effectual. The Courts have in this case also recognised the right of transferee to stand in the shoes of the transferor and to enforce his equity by means of a suit for the general partition of the entire family property, and in order to do equity as between the transferor and the transferee will endeavour to marshall the property in such a way as, if possible, to give effect to the alienation, but this is in order to avoid a fraud upon the transferee, and this procedure will not be adopted to the prejudice of the other co-parceners..

In the present case the 1st defendant and his four sons in 1891 formed a joint family, and as such owned ancestral immoveable property. By a sale-deed, dated 10-12-91 (Exhibit I) the 3rd defendant, one of the sons, conveyed one-fifth share of specified ancestral immoveable property situate in Appayampatti village to one Govindan Chetty; and by a sale-deed, dated 9-12-94 (Ex. III) the latter conveyed the same parcels to the 1st defendant. In paragraph 5 of his written statement the 1st defendant stated that he made this purchase in order to avoid unnecessary litigation, and since there is no allegation that the purchase monies were his self-acquisition, it may be presumed that the purchase was for the benefit of the family, and the effect of the conveyance Exhibit III was to extinguish the claim of Govindan Chetty under Exhibit I. Even if Exhibit III, could be construed as an assignment to the 1st defendant of Govindan Chetty's right in *personam* against the 3rd defendant, it would merely give to the 1st defendant an equity against the latter which he could enforce upon a partition of the family property. In either view and in accordance with the principle above enunciated the 3rd defendant remained a member of the family. About the year 1900, the 1st defendant succeeded by inheritance to ancestral property which had been taken by his brother upon a partition made sometime prior to 1891;

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and two of his sons died between the year 1891 and 1904. The 3rd defendant then, as a member of the family, became entitled to an increased share both in the properties situate in Ayyampattai village and in property situate in Poojaripattai village.

By a sale-deed dated 31-8-04 (Exhibit A), the 3rd defendant conveyed a half share of specified immoveable properties in both these villages to 4th and 5th defendants, who, by a sale-deed dated 3-12-05 (Exhibit B), conveyed the same parcels to the plaintiff, who is a divided brother of the 1st defendant. By a sale-deed, dated 12-11-04 (Exhibit C), the 2nd defendant conveyed certain shares in specified immoveable property in the same villages to one Muthusami Chetty.

By his plaint, the plaintiff claimed as assignee from the 3rd defendant, under the deeds Exhibits A and B, that these properties should be divided and one-third share should be allotted to him. By their written statement the 1st and 2nd defendants pleaded, *inter alia*, that the 3rd defendant had been outcasted and excluded from the family for more than 12 years prior to the suit, and that his right to a share became extinguished by the sale under Exhibit I; and also that certain liabilities of the family should be provided for before any partition could be made.

I think that the plaintiff might have maintained a suit for partition, as assignee of the interest of the 3rd defendant in the properties comprised in the sale-deeds Exhibits A and B but that his proper remedy was by a suit for general partition of the family properties and that when an issue was raised by the District Munsif as to the frame of the suit, he should have applied for amendment of his plaint accordingly, and that the suit might have been dismissed upon this ground (See *Subba Row* v. *Anantnarayana Aiyar* [1].

I agree with my learned brother that the plaintiff's suit also fails on the ground that the 3rd defendant's rights had been lost by prescription and with the decree proposed by him.

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1. (1912) 23 M. L. J. at 70.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Venkata Sastrulu v. Sitaramudu

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Seshagiri Aiyar.

Upadrasta Venkata Sastrulu *Appellant in all. (Plaintiff).**

v.

Divi Sitaramudu, and others *Respondents in A. A. O. Nos.* 186 *and* 196 *of* 1911.

Estates Land Act, S. 3 cl 2 (d)—Civil Courts—Jurisdiction—Estate—Waste land in Inam Village—Part of Estate—Grant of waste land—Grant of both the warams—If Equivalent to—S. 8 exception to—Surrender—Not a mode of acquisition—Tenants not having occupancy right—Effect of change of tenants.

Where in a suit for ejectment brought in a Civil Court against a tenant holding under a lease for a year after the expiry of the term, it was found that the land formed part of an Inam village, that it was waste at the time of the grant and that since then no occupancy right had been acquired by any tenant, the tenants in occupation being only yearly tenants from whom the plaintiff had taken surrender before he gave the land to the defendant.

Held, that the land in suit formed part of an Estate and that it had not ceased to be such by reason of any acquisition by the plaintiff of the Kudivaram interest and that therefore the suit was not cognizable by the Civil Court.

Per *Sadasiva Aiyar J*:—Where the Government grants a whole village in which some lands are lying waste but most of them are under cultivation the presumption is that the grant is only grant of the melwaram and the Inamdar has not the kudivaram right even in the waste lands though he could create Kudivaram interest by letting them to tenants and could have before the Estates Land Act converted them into private land by getting them cultivated by his own servants.

Where however all the land in the village was waste at the time of the grant or a portion of the village granted being waste, the grant might properly be held to include the Kudivaram also; where whole village lying waste is granted in Inam it cannot be said that the grant is a grant of the revenue also and as such no part of the village will come within the definition of Estate in S. 3 cl. (2)(*d*).

The view of Miller J. in *Ponnuswamy Padayachi* v. *Karuppudayan* (1) that land in an inam ceases to be part of an estate when the tenant is shown not to have occupancy right therein dissented from.

Where an Inamdar gives waste lands for cultivation without giving the cultivator permanent occupancy right and changes the cultivation from time to time it cannot be said that thereby he acquires kudivaram interest where there is no evidence that he let them expressly as private land.

Abandonment or surrender is not a mode of acquisition contemplated by S. 8.

A suit for ejecting a tenant from a ryoti land will lie only in the Revenue Court *Buchi Saravagarudu* v. *Venkata Raju* (2) *Ardajari Rama Reddi* v. *Karpi Sivaga* (3) followed.

Per *Seshagiri Aiyar J.* Where the Government grants a village part of which only is waste, though in respect of the waste land the grantee becomes the owner

* A. A. O. Nos. 186 to 196 of 1911. 18th March 1914.

1. (1914) 26 M.L.J. 285. 2. (1913) 25 M.L.J. 617. 3. (1913) 21 I.C. 916.

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of both the kudivaram and melvaram interests the village is an estate as it fulfils both the conditions required by S. 8, cl. 2 (*d*) *vis* that the entire land Revenue to which the grantor is entitled should be transferred (2) that the grantee should not have been the owner of the kudivaram of the village as a whole.

Surrender *ipso facto* is not a mode of acquisition and as such is not included in the word "otherwise" in S. 8.

Appeal from the orders of the District Court of Kistna, in A. S. Nos. 293 to 302 and 432 of 1910 respectively preferred against the decrees of the Court of the District Munsif of Gudivada in O. S. Nos. 453 to 460, 462, 463 and 461 of 1908 respectively.

These appeals coming on for hearing the Court (Sundara Aiyar and Sadasiva Aiyar, JJ.) made the following †

ORDER:—Before disposing of these appeals we consider it desirable to have findings on the following points:—

(1) Whether the land in question in each of these suits was waste land or cultivated land at the time of the grant of the inam,

and (2) Whether at the time of the letting to the defendant in each suit the Kudivaram over the land in the suit had been acquired by the inamdars.

Both parties may adduce fresh evidence. The findings should be submitted within three months from the date of receipt of this order in the court below and the parties will be at liberty to file memoranda of objections to the said findings within 7 days after notice of return of the same shall have been posted up in this Court.

In compliance with the above order, the District Judge of Kistna submitted the following

FINDINGS:—These appeals have been remanded to give a finding on the following two issues:—

1. Whether the land in question in each of these suits was waste land or cultivated land at the time of the grant of the Inam?

2. Whether at the time of the letting to the defendant in each suit the kudivaram over the land in the suit had been acquired by the inamdars?

(2) *Issue 1.* The grant was about 1748; therefore neither side has either oral or documentary evidence to offer.

The plaintiff in his plaint alleges the lands were waste, the defendant states that he cannot adduce evidence to the contrary and admits that though the Village

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† 27th Sep. 1912.

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was under occupation at the time of the grant as shown from its description of "Monne" in the grant, yet there is no presumption that these particular lands consisting of 60 acres out of a total of 300 acres for the whole village, were under cultivation at the time

Defendant is therefore content that the finding should be that the lands were waste, as claimed by plaintiff, at the time of the grant. This is my finding on the issue.

(3) *Issue 11.* Neither side adduces any further evidence.

The lower court held that the tenants who relinquished the suit lands at the end of fasli 1313 had no occupancy rights.

Exhibit N, pages 46—48 of the printed papers, are the relinquishment deeds. The defendant admits that he cannot contest this finding which is rightly arrived at on the evidence before the lower court. I agree with the finding of the lower court that these tenants had not occupancy right.

(4) These tenants therefore had not the kudivaram interest in the land. I take the meaning of the "kudivaram interest" in Section 8 Exception, to mean the permanent right of occupancy, for there is no other meaning that can be given to it in the light of the Act which is to give the right to the tenant in all cases except in home-farm lands.

Therefore as these tenants had not that kudivaram interest, the land-lord by their surrender of the lands could not acquire it; for by the surrender he could only acquire what the tenants had to surrender, and that was a mere temporary occupation at the will of the land-lord

Therefore the land-lord did not acquire the kudivaram interest in the suit lands by their being surrendered under Exhibit N. series.

It is accepted by both parties that the suit lands are those surrendered under the Exhibit N series of surrenders at the end of Fasli 1313.

(5) Plaintiff claims to have acquired the Kudivaram interest also by the surrender of the lands at the end of fasli 1316 by the then tenants. Page 76 of the printed record is the evidence of this surrender. It is a question whether it was a surrender or a forceable ejectment but the same argument applies. These tenants, the plaintiff admits, nay claims, had not occupancy right in the lands, therefore by the surrender he could not acquire the kudivaram interest.

(6) The only other way he could acquire it, is if he had it at the time of the grant, and it reverted to him as soon as these ceased to be tenants or that it remained vested in him all the time as the tenants had no occupancy rights.

(7) I have no hesitation in holding that he could not have the kudivaram interest at the time of the grant for a grant to an inamdar is the royal share of the revenue and not of the soil unless the inamdar specially proves the latter, and in this case he does not, nor does he prove that he had occupancy rights in the lands of the inam before the grant. Therefore he can only deal with the holders of the land as tenants to claim assessment from them. He has no interest in the soil *i. e.*, he has not the kudivaram right. Even if the lands were unoccupied at the time of the grant or became unoccupied at the time of the grant as is the case in these suits, as I have found them to have been waste at the time of the grant and to have been surrendered at the end of fasli 1313, yet the lands would only be seri lands in which the landlord would have no interest in the soil. All he could do would be to rent them out at the best terms he could arrange with the new tenants. For this statement of the inamdar's position I refer to I. L. R. 20 Bombay 415 at 420.

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(8) My finding therefore on issue II is that the kudivaram over the land in the suit had not been acquired by the inamdars at the time of the letting to the defendant in each suit

Pronounced in open Court this 19th day of November 1912.

These appeals came on for final hearing after the return of the findings of the Lower Appellate Court upon the issues referred by this Court for trial.

M. O. Parthasarathi Aiyangar and *V. Ramesam* for Appellants.

S. Srinivasa Aiyangar and *V. Ramadas* for Respondents.

The Court delivered the following

Judgments :—*Sadasiva Aiyar J* :—Plaintiff is the appellant. He is an Inamdar of a village called Billapadu, the Inam grant having been made so long ago as 1748. That village was then a Mouje village, that is, a village in which there were peasant proprietors owning cultivable lands even then. The suit relates to 60 acres out of the 300 acres in that village. For the purposes of this case, it must be taken that these 60 acres were lying as immemorial waste at the time of the Inam grant to plaintiff's ancestors. It is further found by the Lower Appellate Court that these lands were afterwards given by the Inamdar for cultivation from time to time to different sets of tenants without occupancy right. Paragraph 7 of the plaint says "In Fasli 1317 the plaintiff changed the tenant who was in possession prior to that time and leased the schedule mentioned lands to the defendants for only a year." Treating the one year's tenancy as having expired on the 1st of April 1908 the suit was brought to eject the defendants in the District Munsif's Court of Gudivada.

The preliminary contention raised by the defendants was that as the plaintiff's inam was an estate falling under S. 3 clause 2 (*d*) of the Madras Estates Land Act, the Civil Court had no jurisdiction to entertain a suit for the ejectment of defendants from the plaint lands which are ryoti-lands in the inam estate. The plaintiff's reply to this contention of the defendants seems to be that the inam itself is not an "estate" under the Estates Land Act, and even if the inam is an estate, these 60 acres either never formed part of the estate or had ceased to form part of the estate and hence the jurisdiction of the civil courts had not been taken away.

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It has been held in numerous cases that, when a whole village is granted to a non-resident Brahmin as Inam, the presumption is that the grant is only the grant of the melvaram right. The grant of the melvaram right means that the grantee is to receive the melvaram revenue from the peasant proprietors who are already in the enjoyment of the cultivated lands in the village and that, as regards the waste lands in the village, he is entitled to create further melvaram revenue for himself by letting them to cultivating tenants. The District Munsif gave a decree for the plaintiffs in this case, but the District Judge on appeal held that the civil court's jurisdiction was ousted as the plaint lands were part of an "estate" and that the lands have continued to be ryoti lands in the estate, the platntiff's ancestor (the grantee) not having been a holder of the kudivaram at the time of the grant of the melvaram to him. I think that the learned District Judge was right in his conclusions, and that his order directing the plaint to be presented to the Revenue Court is correct.

The appellant's learned advocate relied upon the observations found in *Lakshminarasimha Rao* v. *Sitaramaswami* 1 and some similar observations in later cases. I don't think these cases go beyond this point, namely, that if it is proved that at the time of the grant of a whole village in inam all the lands in that village were lying waste or if it is proved that at the time of the grant of certain defined extent of lands in a village, (such a grant being called a minor inam grant), that extent of lands so granted as minor inam was lying waste, the grant might be deemed in either case to be not of the melvaram alone in such waste lands but of the kudivaram also. In such a case, of course, even the whole village so granted will not fall under the definition of "Estate" in Section 3, Clause 2 (*d*), because that section relates to cases where the grant was of the melvaram *alone*. Where the entire lands themselves in the village, as they were lying waste, were granted in inam, it cannot, of course, be said to be a grant of the melwaram alone. But the present case is not such a case. Here the only thing admitted by the defendants is that about 20 per cent. of the lands lay waste when the whole village was granted in inam. I do not think that in such a case, the mere fact that there were some immemorial waste lands situated in the village granted as inam, could remove the village itself from the definition of "estate"

1 (1910) 20 M. L. J. 290.

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or that it can be held that the waste lands never formed part of the estate and were granted on a different footing from the grant of the remaining lands. Just as the private home-farm lands of an Inamdar continue to be part of the estate, though no tenants have got any Kudivaram right in them, so the immemorial waste in an estate does form part of the estate, provided that the grant of the village was intended to be only the grant of the Melwaram right in the village lands. Where the Government or a Zemindar grants a whole village, some lands in which are lying waste but most of the lands in which are under cultivation, I think that the usual presumption prevails that the grant of the village in general terms means only the grant of the Melwaram in the whole village lands including the waste lands. The Inamdar, so far as the waste lands are concerned, cannot be considered to have the Kudivaram right in them though he could create kudivaram interest in a waste land by letting it to a cultivator and could have (before the Estates Land Act) *converted* it into a private land by cultivating it through his home-farm servants and thus got the Kudivaram right vested in himself. Till he does either of these things, the lands would lie waste, *owned* by the Inamdar, no doubt, in a certain sense (which is not all an unreal sense) but he cannot be said to have the Kudivaram right in it, Kudivaram implying direct contact by cultivation with the soil. I do not feel myself much impressed with the argument based on logic that the Kudivaram in a waste land must belong to somebody and, as regards immemorial waste, it must be with the landlord. This argument if pressed to its logical limit, would lead to the conclusion that when a ryoti land is abandoned by the tenant, it becomes at once private or home-farm land as the Kudivaram right till then existing in the tenant became joined in the landlord with the Melvaram right and he became the owner of it to the same extent as he is of the private home-farm land in which land both such rights admittedly combine. The kudivaram might even be admitted to be vested in a sense in the land-holder in ryoti lands abandoned by the former tenant if it is necessary to admit that proposition in order to support his right to grant the kudivaram right to any person he likes after the abandonment by the former tenant of the said lands but that does not vest absolutely in him according to the common law governing the rights of Zemindars and tenants (and now according to the Madras Estates Land Act), in such a

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away that what was ryoti land became converted into the land-holder's private land. Whether this state of things is logical or not, it has been accepted by the Legislature and I think Courts of Justice are under a duty to advance the views of the Legislature as clearly expressed in the Estates Land Act, namely, that the kudivaram interest in ryoti lands should, if possible, be prevented from so permanently vesting in the landlord as to convert them into his private or home-farm lands.

I think it must be admitted that the Judgment of *Miller J.* in *Ponnusawmy Padayachi* v. *Karuppudayan* [1] goes to the length of holding that a land which is not the private or home-farm land of the Inamdar ceases to be part of the estate if no tenant holds permanent occupancy right therein. With the greatest respect, it seems to me that if even private or home-farm land continues to be part of the estate (though the kudivaram right in it admittedly belongs to the Inamdar), the mere fact that no tenant is able to prove that he has a permanent occupancy right in a ryoti land cannot make it cease to be part of the estate. *Spencer J.* in that same case expressed a different view at page 291 and he did not accept the contention that all lands in which no tenant proves a permanent occupancy right in an estate falling under Section 3 clause 2 (*d*) cease to form part of the estate (see the penultimate paragraph of the Judgment of *Spencer J.*). I think *Ponnusawmy Padayachi* v. *Karuppudayan* [1] is binding authority only for the proposition that a suit for the ejectment of a tenant of old waste who has no occupancy right and who holds under an unexpired lease granted before the Estates Land Act can be brought *in a civil court* provided the suit is not based on one of the grounds mentioned in S. 153 clause (a) to (e) of the Estates Land Act.

While the Legislature was not at all anxious to see that home-farm lands are not converted into ryoti lands but was rather anxious the other way (see the proviso to S. 81 of the Estates Land Act), the Legislature has taken great care in S. 185 to restrict the claim of the land-lord to treat lands in an estate as private lands; it has raised a strong presumption in favour of lands being ryoti lands (S. 23) and it has expressly enacted that the merger of the occupancy right in the land-holder even

1. (1914) 26 M. L. J. 285.

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by transfer or succession shall not convert ryoti land into private land (S. 8, Cl. 3). If even a merger by transfer or succession cannot convert ryoti into private land, merger by abandonment or surrender (supposing such a merger can take place) cannot a *fortiori*, so convert it (see also S. 6, Cl. 2). I have held in *Suryanarayana* v. *Potannah* [1] (following *Badan Chandra* v. *Rajeswari*, [2] and *Muktakeshi* v. *Pulin Behari* [3] that acquisition by the landholder of the kudivaram by surrender or abandonment of the land by the tenant cannot remove the tenant's land from the definition of an " estate " even when the "estate " was one falling under S. 3, Cl. 2 (*d*). As regards all other kinds of estates, the intention of the Legislature is quite clear and the exception to S. 8 should therefore be strictly confined to the narrowest limits. The Lower Appellate Court's conclusion, therefore, that so far as the plaint village, that is, the village, as a whole, is concerned, the land revenue alone was granted in Inam to a person not owning the kudivaram thereof is correct. The village is an estate under S. 3, Cl. 1 (*d*) of the Estates Land Act, and the 60 acres in dispute is part of the estate. Even immemorial waste lands in an estate are ryoti lands unless they are proved to come under the peculiar definition of "old waste" or unless they are proved to be private land (S. 23 of the Estates Lands Act). In *Ramachandra* v. *Venkatarao* [4] and *Rajya* v. *Balakrishna Gangadhar* [5] it was held that an Inamdar could not be held to have the same rights in the soil of immemorial waste lands as a Kudivaramdar has in the soil of his holding, though the Inamdar had the right to convert any portion of the immemorial waste into home-farm lands, that is has the right to get kudivaram and occupancy rights by actual cultivation. I would, therefore, hold that the plaint lands were ryoti lands and not the private lands of the Inamdar-landholder at the time of, and immediately after, the inam grant.

When the Inamdar afterwards granted the lands for cultivation without giving the cultivators permanent occupancy rights (but only the rights to occupancy for one year or from year to year or a specified number of years) and when he changed the cultivators from time to time, it cannot be said that thereby the Inamdar himself got any permanent occupancy or kudivaram

1. (1918) 26 M. L. J. 99
2. (1905) 2 C. L. J. 570.
3. (1909) 8 C. L. J. 324.
4. (1882) I. L. R. 6 B. 598, 608.
5. (1905) I. L. R. 29 Bom. 420.

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right in the land as there is no evidence to prove that he let them expressly as his private or home-farm lands. The occupancy right (that is, the right to occupy and cultivate) was enjoyed by the cultivating tenants from time to time though they did not get a permanent occupancy right thereby. The contention that by the surrender of the land by the predecessor of the defendants to the Inamdars, the Inamdars got permanent occupancy or kudivaram rights under the exception to S. 8 of the Estates Land Act is untenable both for the reasons mentioned in my judgment in *Suryanarayana* v. *Potannah* [1] and also for the reason stated by the learned District Judge on the facts of this case, namely, that even if the surrender by the tenant be equivalent to a transfer of the tenant's right to the land-lord, the tenant who surrendered had himself no permanent occupancy or kudivaram right to transfer to the land-lord. The judgment of my brother *Tyabji J.*, in the recent cases, *Buchi Sarva Garudu* v. *Venkata Raju*,[2] and *Ardajari Rama Reddi* v. *Karpi Sivaga*,[3] have decided that so far as ryoti lands are concerned a suit for ejectment of a tenant by a land-holder on any ground could be brought only in the Revenue Court. In the result, I would therefore dismiss these Civil Miscellaneous Appeals without costs.

Seshagiri Aiyar J.—The question for decision in these cases is whether the Civil Courts have jurisdiction to entertain the suits. My conclusions are based on the pleadings in the case and on the admission of the parties; any pronouncement made regarding the rights of the plaintiff and the defendants on this preliminary issue will not conclude parties at the further hearing of the case by the proper tribunal. The facts of the case in so far as they are material for the determination of this point are these. The village in question consists of 300 acres. It was granted to the ancestors of the plaintiffs in 1748. Of these, 60 acres were uncultivated and were lying waste. The remaining 240 acres must be taken for purposes of this case to have been under the occupation of tenants who had permanent rights. The present litigation relates to the 60 acres which were waste at the time of the grant. If the village is an *estate* then the civil courts have no jurisdiction to entertain this suit; otherwise this suit was rightly instituted. This is an Inam village and as such it comes under S. 3, Cl. 2 (*d*) of the Estates Land Act. There is

1. (1914) 26 M. L. J. 99. 2. (1918) 25 M. L. J. 617.
3. (1918) 21 I. C. 916.

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no doubt that the entire land revenue of the village was granted to the plaintiff at the time of the grant. But there was a portion on which no land revenue was due because it was waste land. I do not think that makes any difference in the decision of this case. It is true that the language of the definition would show that nothing but land revenue should have been granted if the village is to be regarded as an estate. The fact that upon a portion of the village no land revenue was due is not enough to conclude that the grant of the inam was not an estate. In coming to this conclusion I have not lost sight of the suggestion made by the learned counsel who appeared for the appellant that the grant of rights in the waste land must include the kudivaram rights as well. I think there is a great deal of force in this argument.

It has been argued by Mr. Srinivasa Aiyangar that where a grant is of unoccupied waste land all that the grantee acquires is a right to annex it to his home-farm land by doing certain acts indicative of his intention to do so, and that till then he acquires no higher rights in it than what he has in the lands occupied by permanent tenants. *Prima facie* the grant of the soil comprises all there is in it. The potentiality of a tenant acquiring occupancy rights may be there, but that will not derogate from the grantee having full rights in the soil at the time of the grant. The history of legislation in this country, of which we are bound to take judicial notice, shows that the right in the soil vests in the paramount power. It may be open to argument when a particular legislation comes to be tested before a court of law whether such an assumption is well-founded. Till the Legislature makes a departure, courts are bound to proceed on the assumption that the right in the soil is in the Government. This is based on the theory that the ancient sovereigns of this country had similar right. In that view, I must hold that the grant of the village in 1748 included the right to such revenue or rent as the grantor had in the village, plus the full rights in those unoccupied portions of the village in which the tenants had no permanent rights of occupancy. My conclusion therefore is that in 1748 the grantee acquired both the Kudivaram and Melvaram rights in the 60 acres, and the rights of the Melvaramdar alone in the remaining 240 acres. Even in this view, I must hold that the village that was granted in 1748 was an estate under the Estates Land Act.

The use of the word *alone* in qualifying *land revenue* is somewhat misleading. What the Legislature meant to lay down was that no kudivaram rights should have been granted in the lands which were under the occupancy of tenants; any other construction will lead to difficulties. Supposing the boundaries of a grant included, as it always does, a few stray acres of waste land and some poramboke; in all such cases, if Mr. Parthasarathy Aiyangar's contention were upheld, there will be no grant of an estate. In order to bring a case within S. 3, clause 2 (*d*) all that need be proved is (1) that the entire land revenue or rent which the grantor was entitled to in the village must have been transferred, (2) and the grantee should not have been the owner of the kudivaram of the village as a whole. In the present case both these conditions are found. I have therefore come to the conclusion that the village is an estate. The jurisdiction of the Civil Courts would be taken away unless the plaintiff can show that he is entitled to the exception to S. 8 of the Estates Land Act.

We have heard very full arguments upon the construction of this exception both from Mr. Srinivasa Aiyangar for the defendant and from Mr. Ramesam for the plaintiff. The plaintiff must show in order to claim the exemption that he had acquired the kudivaram right since the grant. The fact that the right was given to him by the grant will not be enough because he has to show the right was subsequently acquired and inheres in him at the time of the suit. The question is whether by surrender at the end of Fasli 1316 by the then tenants the plaintiff has acquired the Kudivaram right. It is found by the District Judge in paragraph 4 of his finding that the tenants had no occupancy rights at the time of the surrender. Therefore any surrender by them will not enlarge the rights of the plaintiff. Secondly it is doubtful whether the exception contemplates the acquisition of kudivaram rights by surrender. Clause 1 of that section speaks of the union of the rights of the landlord and tenant by transfer, succession or *otherwise*. Unless the word "otherwise" includes cases of surrender, the exception will not avail the plaintiff. In considering a similar clause in the Bengal Tenancy Act, it was held in *Badan Chandra Das* v. *Rajeswari Debya*[1] and *Muktakeshi Dasi* v. *Pulin Behary Singh*[2] that surrender is not

1. (1905) 2 C. L. J. 570. 2. (1909) 9 C. L. J. 824.

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ejusdem generis with transfer and succession. The same view was taken by Justice *Sadasiva Aiyar* in *Suryanarayana* v. *Potanna* [1]. In *Ponnusamy Padayachi* v. *Karuppudayan* [2] Mr. *Justice Miller* has taken a different view. In this state of authorities I have to find out whether surrender is analogous to transfer or succession. In Blackstone's Abridgment it is stated that in order that a surrender may clothe the surrenderee with all the rights of the surrenderor there should be acceptance by the former. In *Oastler* v. *Henderson* [3] the plaintiff had let a house to the defendant for 7 years from 1868. In December of that year the defendant surrendered the keys to the plaintiff. The plaintiff employed agents to advertise the house for letting, but it was not until 1872 that he was able to get a new tenant. In 1870, for a short time, some workmen of the plaintiff occupied two rooms in the house for the purposes of plaintiff's business. The plaintiff sued the defendant for rent from December 1868 to 1872. The defence was that there was a valid surrender and that the acts of the plaintiff amounted to an unequivocal acceptance of the remaining term and consequently defendant was not liable to pay rent. The Lords Justice refused to uphold this contention. *Cockburn C. J. says* that the plaintiff had not taken possession of the premises; "and in order to estop the lessors, so as to constitute a surrender by operation of law, there must be a taking of possession. The plaintiffs (the landlords) took the keys because they could not help themselves, the defendant being gone. Then they try to let the house. The landlords did nothing but what they might reasonably be expected to do under the circumstances for the benefit of all parties." He concludes by saying that the occupation for short periods by plaintiffs' tenants did not manifest an intention not to hold the defendant to his lease. *Lord Justice Brett says*: "If after the agreement the landlord actually takes possession or does what virtually amounts to it, if he not only attempts to let out actually does let, then there is a palpable act done with regard to the premises raising an estoppel within the rule laid down in *Nickells* v. *Altherstone* following *Lyon* v. *Reed.* It seems to me that there was no act done amounting to an estoppel prior to March 1872." The view taken is that the mere delivering up does not take away the

1. (1914) 26 M. L. J. 99. 2. (1914) 26 M. L. J. 285.
3. (1877) 2 Q. B. D. 575.

liabilities of the one nor add to the rights of the others. Some overt act calculated to show that the surrenderee has exercised dominion over the property, and has added it on to his estates is necessary. Some act has also to be done by way of putting an end to the tenancy. This conclusion derives support from the decision in *Cheekati Zemindar* v. *Ranasooru Dhora* [1] where Mr. *Justice Subramania Aiyar says* at page 324 " For in the case of lands which have been relinquished by the former occupants or which have been lying waste from time immemorial, they too, when taken up by a raiyat, are treated exactly on the same footing as land into the possession of which it is not shown that the raiyat was let in by a Zemindar, and the raiyat holds possession of them for an indefinite period."

In my opinion surrender *ipso facto* is not a mode of acquisition and has not the same effect in conferring rights as transfer or succession. Consequently the word *otherwise* will not include a surrender, because that will be obnoxious to the principle of construing words *ejusdem generis.*

My conclusion is that the plaintiff is not entitled to the benefit of the exception to section 8, and the village is an *estate* and as such the Civil Courts have no jurisdiction to entertain the present suits. I would make no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Seshagiri Aiyar.

Muthusamy Aiyar — *Petitioner.** (*Plaintiff*).

v.

Solai Konan *alias* Ramiah Konan — *Respondent* (*Defendant*).

Benamidar—Landlord and Tenant—Rent deed in favour of benamidar—Payment to real owner—Defence.

Payment to the real owner is a defence to a suit for rent brought upon a rent deed executed in favour of the benamidar.

Kuppukonan v. *Tirugnan Sammandam* [2] followed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Valangiman in S. C. S. No. 1072 of 1912.

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* C. R. P. No. 477 of 1913. 17th April 1914.

1. (1899) I. L. R. 23 M. 318.
2. (1908) I. L. R. 31 M. 461.

Muthusamy Aiyar v. Solai Konan.

Seshagiri Aiyar J.

C. A. Seshaghiri Sastri for Petitioner.

K. V. Krishnasami Aiyar for Respondent.

The Court delivered the following

Judgment:—The finding in this case is that the plaintiff was a benamidar for Kamakshi Ammal. The issue raised in the case covers this question and there is evidence upon which the Court below was entitled to come to the conclusion that the defendant executed the document to the plaintiff at the instance of Kamakshi and on her behalf. I accept this finding. Then Mr. Seshagiri Sastri argues that as the rent deed was executed to the plaintiff payment to Kamakshi Ammal cannot absolve the defendant from liability to him and he relies upon the authority of *Jai Narayan Bose* v. *Kadimbini Dasi* [1] for that position. There has been a conflict of views in regard to this question and so far as this High Court is concerned in *Kuthaperumal Rajali* v. *The Secretary of State for India* [2] the learned Judges have come to the conclusion that the real owner is entitled to maintain a suit in his own name for recovery of property or money. Following that decision Mr. *Justice Wallis* in *Kuppu Konan* v. *Thirugnan Sammandam Pillai* [3] has held that the plea of estoppel available against a tenant is only in favour of the real owner and not in favour of the benamidar. I entirely agree with this view. The money having been paid to Kamakshi the defendant is discharged from liability to the plaintiff and the suit was rightly dismissed by the District Munsif and I dismiss this petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling.

Nalli Veera Thevan and another — * *Accused in Calendar Case No.* 104 *of* 1913 *on the file of the Sub-Divisional Magistrate of Erode.*

Nalli Veera Thaven In re.

Indian Penal Code, S. 215—*No application to thief—Conviction—Where conviction in the alternative for offences under S.* 379 *and* 411 *I. P. C.—Illegality of—Criminal Procedure Code, S.* 239—*One trial for offences under S.* 379, 411 *and* 215—*Misjoinder.*

S. 215 I. P. C. is not intended to apply to the thief but to some one, who being in league with the thief receives gratification for helping the owner to recover the

* Ref. Case No. 10 of 1914 and Cr. R. C. 91 of 14. 23rd April 1914.

1. (1869) 7 Beng. Law Reports 728 (foot note).

2. (1906) I. L.R. 30 M. 245. 3. (1908) I. L. R. 31 M. 461.

Nalli Veera Thevan In re.

stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted.

Quaere whether S. 215 if applies to receiver of stolen property.

But the convictions of a person under this Section where he has been convicted in the alternative for offences under Ss. 379 and 411 I. P. C. is illegal Where close association between the accused persons justifies the inference that the theft and retention of cattle and their restoration on payment were all part of one plot and one transaction the trial of the persons concerned; one for theft, another for receipt of stolen property and a third for the offence under S. 215 together, is not bad for misjoinder of charges.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the Sessions Judge of Coimbatore in his letter of 29th January 1914.

Public Prosecutor on behalf of Government. Accused not appearing in person nor represented by pleader.

The court made the following

ORDER:—The evidence certainly justifies the conviction of the 2nd accused in the alternative under S. 379 or S. 411 I. P. C. and also the conviction of the 1st accused under S. 215 I. P. C. I agree with the Sessions Judge that the evidence does not support the conviction of the 1st accused under S. 379 or S. 411 I. P. C.

The legality of 2nd accused's conviction under S. 215 has next to be considered. It has been held in *Queen Empress* v. *Mahammed Ali* [1] that the section was not intended to apply to the actual thief, but to some one, who being in league with the thief receives some gratification on account of helping the owner to recover the stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted. Whether the principle of the ruling would apply where the receiver of the gratification was also in dishonest possession of the stolen property under S. 411, but not the actual thief, is open to argument. I express no opinion. But in the present case the 2nd accused has been convicted in the alternative of an offence under S. 379 or S. 411 I. P. C. I think the spirit of the ruling should apply, and the conviction under S. 215 should be set aside.

I see no reason to order a retrial on the ground of misjoinder of charges; for the evidence of close association between the accused persons justifies the inference that the theft and

1. (1900) I. L. R. 23 A 81.

Nalli Veera Thovan *In re.*

retention of the cattle and their restoration on payment were all part of one plot and one transaction within the meaning of S. 239 Criminal Procedure Code.

I set aside the conviction of 1st accused under Ss. 379, 411 and 75 I. P. C. and that of the 2nd accused under S. 215.

The sentences are reduced to six months' regular imprisonment for each accused.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present :—Mr. Justice Tyabji and Mr. Justice Spencer.

Sri Sri Sri Brundavana Chandra Horischandana Jagadd Raja Bahadur ... *Appellant** (*L. R. of the plaintiff.*)

v.

Proghada Ramayya and another ... *Respondents* (*2nd defendant and 1st defendant's L. R.*)

Brundavanachandra Horischandra Raja *v.* Ramayya.

Estates Land Act, Ss. 3, 6—Estate—Grantee from widow—Landholder—Ryot—Presumption of grant of occupancy—Waste lands—Stronger than in case of occupied lands—Based on practice of Zamindaries—Onus of rebutting.

A tenant introduced into the land by a grantee from the widow of a landholder is a ryot within the meaning of S. 3 of the Estates Land Act though the grant may be one which is not binding on the reversioner and is entitled to the benefit of S. 6 of the Act.

Portions of estates which are granted away but are not held on permanent undertenures continue part of the estate notwithstanding such grants. The presumption as to grant of occupancy laid down in *Cheekati Zamindar* v. *Ramasoora Dhor* 1 being based on the practice of Zamindaries in general and not on the practice of any Zamindaries in particular, it is for a person alleging that the practice in his estate is different to adduce evidence and prove that it is, in fact, different.

The presumption in favour of the grant of occupancy is stronger in the case of waste lands than in the case of occupied lands.

Second Appeal from the decree of the District Court of Ganjam at Berhampore in Appeal Suit No. 32 of 1907 preferred against the decree of the Court of the District Munsif of Sompeta in O. S. No. 617 of 1901.

Dr. S. Swaminadhan for Appellant.

V. Ramasam for Respondent.

The Court delivered the following

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* S. A. No. 563 of 1912. 30th March 1914.

1. (1899) I. L. R. 23 M. 318.

Brundavanachandra Horischandra Raja v. Ramayya

Judgment:—This appeal arises out of a suit for ejectment. It is argued before us that the learned District Judge was wrong in proceeding on the basis that the 2nd defendant had occupancy rights in the lands from which the plaintiffs wish to eject him; that there is no ground on which the 2nd defendant could have been held to be a ryot under S. 3 (15) of the Madras Estates Land Act; that assuming that the second defendant could have acquired the status of ryot, he was not admitted as such by the landholder under S. 163 (1) and that in the event of any of these contentions being upheld the plaintiffs would be entitled to eject the 2nd defendant from the land.

All these arguments so far as the present appeal is concerned centre round one question: whether a person who is admitted into the possession of waste lands in 1884 can claim the rights and rely upon the presumptions in favour of ryots contained in the Estates Land Act.

S. 3 (15) of the Estates Land Act is in the following terms:—

"Ryot" means a person who holds for the purpose of agriculture ryoti land in an Estate on condition of paying to the landholder the rent which is legally due upon it.

It is argued that it does not apply because there is no condition for payment of rent accepted by the 1st or 2nd defendant. There is however an agreement to pay Re. 1 per acre (under Exhibit A). This payment has been evidently considered to have been by way of rent. It is not within our province to consider in Second Appeal whether or not the payment of this sum ought to be otherwise considered. But we feel difficulty in understanding under what other description it could have been held to fall.

Another ground taken in argument was that S. 6 of the Madras Estates Land Act, cannot apply. For this purpose it was contended first that the grantor of Exhibit A was not a landholder as defined in S. 3 (15). The grantor was the 1st defendant. He traced his right from Exhibit M which refers to itself as a pattah granted as Mokhasa. It is true that Exhibit M purported to be for an indefinite period and the grantor of Exhibit M was the widow of the Zamindar who had herself only a life interest and could therefore not have made a grant for a period extending beyond her life and *Modhu Sudan Singh* v. *Rooke* [1]. But in our opinion that does not affect the question

1. (1897) I. L. R. 25 C. 1,

Brundavanachandra Horischandra Raja v. Ramayya.

whether it is a grant. During the continuance of Exhibit M no other person could have admitted any tenant into the land except the grantee under Exhibit M.

Secondly it was contended that S. 6 could not apply because the second sub-section requiring (1) that the holder should be a landholder and (2) that the land should be an estate; it may therefore be (so it was argued) that the grantor may be a landholder, and yet the land in question may not fall within the definition of an estate in S. 3 (2); that in such a case S. 6 would not apply. For this purpose it was argued that the land in question could fall only under clause (*c*) of S. 3 (2) and that it was not a permanent undertenure. This argument seems to us to be incapable of being supported. The clause that seems to us to apply is clause (*a*). It was argued that clause (*a*) could not apply, as if it is taken to include the land in question it would imply that clause (*e*) is unnecessary. We are unable to accede to this argument. Then it was argued that clause (*a*) could not apply to parts of a Zamindari. In this connection it is necessary to advert to the nature of the question with which we are now concerned. The question is whether a person in occupation is to be presumed to hold the land on such terms as tenants of Zamindari lands generally hold them. That presumption is based on the well recognised fact that the Zamindar has primarily the right merely to collect the tax on the land to retain a part of it which part is now represented by the Melvaram. The presumption arises from the history of land-tenures and of cultivation in the past and from the nature of the rights of the Zamindar. Considered in this light the argument is deprived of all point. We are of opinion that clause (*a*) is applicable.

Finally it was argued before us that the case *Cheekati Zamindar* v. *Ranasoru Dhora* [1] is not applicable inasmuch as the decision in that case proceeds on the ground (page 322) that where the generality of tenants in the Zamindari have occupancy rights it is a fair presumption to raise that newly admitted tenants are admitted on the same terms. It was argued that there is no evidence in this case that the generality of the tenants in the particular Zamindari have rights of permanent occupancy. This argument omits to take into consideration the gist of the decision in ***Cheekati Zamindar*** v. ***Ranasoru Dhora*** [1]. That decision establishes that by

1. (1899) I.L.R. 23. M. 318.

virtue of repeated proof of the fact that in zamindaries the prevailing terms of tenancy include the right of permanent occupancy in favour of the tenant the courts are in a position to take judicial note of the existence of such terms and to presume that they exist. If as is suggested before us it is the case of the appellant that in the particular zamindari in question the prevailing terms of tenancy do not include the right of permanent occupancy it was for the appellant to have adduced evidence on the point. It is not suggested that any such evidence was tendered and rejected. It is not even now stated to us that the appellant is desirous of adducing any such evidence.

In connection with the point with which we have last dealt it was argued that the presumption referred to is not applicable inasmuch as the land was waste at the time of the original grant. Two circumstances may be alluded to in reference to this argument: first, if the presumption (based on conformity with general experience no less than on the policy of law and the history of land tenures) is that a ryot who comes into possession of land ready for cultivation is let in on terms of permanent occupancy then the presumption would be stronger in the case of one who is let in on the understanding that he will make lands cultivable which were previously incapable of being cultivated. In such a case principles of even wider applicability form the support of the presumption. The other consideration in the terms in which old waste is defined in S. 3 (7). The terms of that section are clearly inapplicable to the land in question. This had to be conceded when it was pointed out that under S. 3 (7) (1) land cannot be called old waste unless it is shown (a) that the land hasbeen owned and possessed by the land-holder or his predecessor in title for a continuous period of not less than 10 years.

(*b*) That during the said period of ten years the land has continuously remained uncultivated.

(*c*) That the said period consists of a period.

i. after 1908 or,

ii. partly before and partly after 1908 or,

iii within 20 years before the passing of the act *i.e.* since 1888.

Brundavana-chandra Horischandra Raja v. Ramayya.

It is the last requirement of the clause (iii) as stated above that is fatal to the land now in question being considered waste. For though the land was uncultivated in 1874 it has been continuously in cultivation since 1884 Hence it is clear that the land cannot be considered old waste.

The result is that the appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction)

Present:—Mr. Justice Wallis.

K. Seetharam Naidu and others *Plaintiffs.**

v.

K. Balakrishna Naidu and others *Defendants.*

Seetharam Naidu. v. Balakrishna Naidu.

Wallis J.

Hindu Law—Alienation—Ancestral property—Suit to set aside same by son—Burden of proof on alienee to prove antecedent debt or justifying necessity—Consideration partly found to be binding on the son—Decree—Form of.

In a suit by sons to set aside alienation of ancestral property by the father, the onus is on the alienees to prove that there was an antecedent debt or a justifying necessity for the alienation, (29 M. 200, 31 All. 176; 28 M. L. J. 211 25 M. L. J. 27 ref).

Where the alienation is found not binding on the sons the alienee acquires the quantum of interest of the alienor at the date of the alienation without any liability to increase or diminution by virtue of subsequent changes in the joint family, (35 M. 47). In case of alienation by a Widow or Guardian or Dharmakartha, the alienation if to a greater extent than is necessary will be set aside on payment to the alienee of the amount which is binding.

Where only a portion of the consideration is bound to be for a necessary purpose, the proper decree to be framed will be to give the father's share in the property to the alienee to give a charge in favour of the alienee on the share of the sons to the extent of their share for the consideration which was found to be for a binding purpose. The shares are to be worked out as in ordinary partition.

Venkatasubba Rao and *Radhakrishnayya* for Plaintiffs.

V. V. Srinivasa Iyengar, C. K. Mahadeva Iyer and *V. Masilamani Pillai* for Defendants.

The Court delivered the following

Judgment:—This is a suit brought by the plaintiffs who are the sons of the 1st defendant to set aside alienations made by the 1st defendant and for partition. The properties in question are alleged by the plaintiff to have descended to the 1st defendant Balakrishna from his father Venkatasawmy. Venkatasawmy was the son of one Gantalamma, who according to the

* C. S. No. 368 of 1911. 21st November 1913.

defendants, was a dancing woman and the evidence is that the whole family were known as Gantala people, that is to say, as descendants. One of the chief alienations attacked is a partition deed, Exhibit C, entered into in 1893, shortly after Venkatasawmy's death between the 1st defendant and his sisters through whom some of the alienee-defendants claim. That deed shows that the 1st defendant Balakrishna and his sisters who, according to the undisputed evidence, still continue to follow the profession of dancing women were all residing together in one house; and it recites that this woman Gantalamma, Venkatasawmy's mother, had effected a partition with her sisters, who according to the evidence were themselves dancing women, as far back as 1874. It also recites that she enjoyed the properties included in the deed with her daughters and intended to leave half of them to her son Venkatasawmy and half of them to her daughters who were dancing girls, that the daughters pre-deceased her and she decided to leave half the property to her son and half of the property to the daughters of the son who had according to the evidence adopted the profession of dancing women. It also recites that she died in 1882 and that since that time Venkatasawmy, her son had been managing and improving the properties. The evidence is that all these properties whether acquired, during Gantalamma's lifetime or after her death, stood in the name of Venkatasamy and that some of the more valuable properties were acquired after her death. There is also evidence that Venkatasawmy kept a small drug store but not such a business as is likely to enable him to become the possessor of these properties. The cession by Balakrishna of half of these properties to his sisters is attacked as an alienation of the joint family property of himself and his son—at that time, he had one son—on the ground it was not made for any antecedent debt or beneficial purpose. On the other hand it is supported on somewhat inconsistent grounds. Mr. V. V. Srinivasa Aiyangar for some of the defendants contended that it should be supported as a family arrangement because these dancing girls sisters had certain claims upon him for maintenance and otherwise. On the other hand Mr. Mahadeva Aiyar for some of the other defendants took a bolder line; he contended that the proper inference was that all these properties had been acquired by these three generations of dancing women as the fruits of prostitution and that under the

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Hindu law, as recognised in this presidency; they formed a joint family who took by survivorship and that consequently all these properties, though they stood in the name of Venkatasawmy, were really the property of the female members of the family and that Venkatasawmy did a very good thing for himself when he acquired one-half of them under Ex. C. and that therefore this acquisition was to be taken to have been a self-acquisition of his with which he was at perfect liberty to deal. As regards this last contention the first thing to be said is that it is nowhere set up in the pleadings nor was it a question on which the parties came to trial. Mr. Mahadeva Aiyar's answer to that is that these alienees did not know and it was only during the course of the case that the real circumstances of the family came to light. But in my opinion this contention has not been established. Admittedly the daughters of Gantalamma predeceased her and though the daughters of Venkatasawmy, the sisters of Balakrishna, engaged in prostitution yet there is no evidence that they were adopted by Gantalamma. If they had been, the question would have to be considered whether any such adoption could at the present day be considered as giving rise to any right to the property but I find it is not proved that they were adopted. On the other hand I am not disposed to accept as literal truth recitals in Ex. C; the conclusion which I am constrained to draw from the evidence is that these people were carrying on, males and females, a sort of joint family business in which this man Venkatasawmy acted as a sort of managing member. No doubt he went so far on the way to respectability as to get married but he seems to have stopped there. He brought up his daughters to prostitution and his son to live with them in the same house; I am not able to say whether such a state of things is common in this part of India but I see in *Ghisti and Nanhi Jan* v. *Umrao Jan* [1] the facts were of a similar description. I find then there was no adoption of Balakrishna's sisters by Gantalamma. Therefore it seems to me that on Gantalamma's death Venkatasawmy was her heir and was entitled to inherit the properties which she had obtained on partition. But it is perfectly clear to my mind that a large portion of these properties was afterwards acquired by Balakrishna's sisters. Therefore they had at any rate a better right

1. (1893) L. R. 20 I. A. 193.

to those gains than any male member of the family who had been aiding and abetting them and it seems to me that although in Ex. C. they did not like to state a number of unpleasant truths, which it was nobody's business to state in Ex. C. it repeats the story of Gantalamma's intention which is simply put in there to make some sort of colorable story—that is the inference I have come to. But I think that these properties were really largely acquired by the sisters of Balakrishna as the earnings of prostitution and that therefore they had a well-founded claim to part of the property which stood in the name of Venkatasawmy after his death and that therefore, in any case there was more than sufficient to support a *bona fide* compromise by Venkatasawmy as head of the joint family of himself and his son. I find that the alienations under Ex. C. cannot be attacked. That disposes of the case of the 2nd & 3rd defendants.

The next question is as to the character of the property Balakrishna took. Mr. Mahadeva Aiyar, as I said, contended that it must be taken to have been self-acquired property. I cannot agree. It was taken by him under the deed, as in the right of his father Venkatasawmi. I think it must be taken to have been ancestral property which descended to him from his father who is proved to have been married and therefore Balakrishna took the share which he got under Ex. C. with all the incidents of joint family property.

Coming now to the other alienations, the question with which I have had to deal is the question of onus. It was contended for the plaintiff that the onus was on the defendant alienees to show that the alienations were made by the father Balakrishna for some antecedent debts or for a purpose beneficial to the family. The only issue relating to that is "whether the alienations are illegal or immoral and therefore not binding". That does not seem to me to cover the issue whether the alienations were for an antecedent debt or for a purpose beneficial to the family, and when the very recent decision in *Ruthna Gramany* v. *Veerabadra Aiyar* [1] was cited at a later stage of the case to show that the plaintiffs must be taken to have accepted the onus of showing that these alienations were not made for antecedent debts which was held to be the case there, I came to the conclusion on a perusal of the pleadings and the issues in this

1. (1913) 25 M. L. J. 28=M W. N. 761.

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case that the plaintiffs had never undertaken any such burden and I have framed the further issue as to whether these alienations were for antecedent debts or for a purpose beneficial to the family as both the pleadings and the evidence were directed to such an issue. That of course is quite an independent issue from the issue whether the antecedent debts, if such they were, were incurred for illegal or immoral purposes. Now as regards the issue whether the alienations were made for an antecedent debt or for a beneficial purpose I am clearly of opinion that in this as in other cases the onus is on him who asserts. Anyone who asserts that the alienation was made for an antecedent debt or for a beneficial purpose is bound to prove it. The difference of opinion which took place in the Allahabad High Court in the case *Chandradeo Singh* v. *Mata Prasad* [1] appears on a perusal of the Judgments, on the one side, of *Chief Justice Stanley* and on the other of *Mr. Justice Banerji*, to have proceeded entirely upon the difference of opinion as to whether in order to support such an alienation as this it was necessary to show existence of an antecedent debt. *Stanley C. J.* held it was, Mr. *Justice Banerjee* it was not. If Mr. *Justice Banerjee* had held that an actecedent debt must be shewn, I take it he must have held that the onus lay upon the person who asserted it. In this court there is a decision of the Full Bench that the existence of an antecedent debt must be shown—I mean in the absence of any beneficial purpose—that is in *Venkataramanayya Pantulu* v. *Venkataramanadoss Pantulu* [2]. The recent decision of the Privy Council reported in *Sri Narain* v. *Lala Raghubans Rai* [3] was referred to. That is a very short Judgment merely affirming the Judgment of the Court below. It can only be understood in my opinion on a perusal of the Judgment of the Court below which was not before me at the trial. But now I am informed, as I believed it must be the case, that no question of the existence of antecedent debts arose there because it was admitted. I think we should be very slow to construe a Judgment of their Lordships as dealing with a question of the first importance in India without assigning reasons. As to the case in *Ruthna Gramany* v. *Veerabhadra Aiyar* [4] though the question is discussed there yet the court deliberately refrained from expressing any final opinion such as would be binding on me. I therefore hold that the onus

1. (1908) I. L. R. 3 I. A. 176 (F. B.)
2. (1905) 29 M. 200 (F B.)
3. (1913) 25 M. L J. 27.
4. (1913) 25 M L.J. 28=M.W.N. 761.

is upon the other defendants to support those alienations and they have very largely failed to discharge it.

I have disposed of Ex. C. The next item No. 4 was alienated on the 20th February 1893 to the 6th defendant. The allegation is family necessity but there is no real proof of that. The 1st defendant's evidence is altogether unworthy of credit; he pretended he was drunk when he executed these deeds and they were all for the purposes of dissipation and he actually included the alienees among his boon companions and several very respectable looking Hindus came into the box as alienees and they by no means corresponded to his description of them as boon companions. The whole thing is a fiction. The next alienation is item No. 8—taking them in order of time—on the 21st February 1894. Ex. IX, an alienation to the 10th defendant, is a sale of the lands of a village just outside Madras because the rents were difficult to collect. The village is just beyond Perambur, the houses are, some of them, tenanted by people in the Railway workshop and the whole suggestion is absurd. That alienation is not proved to have been made for an antecedent debt or for a beneficial purpose. Item No. 9 was alienated on the 18th April 1894 to the 11th defendant for Rs. 130. It was alleged that this was to pay taxes. That I am constrained to find is not proved.

On the 24th October 1895 is the alienation to the 8th defendant (Exhibit F) of item 6 for Rs. 200. No evidence was offered as to this alienation which I hold to be not binding.

Then we come to a mortgage of the 8th July 1897 of items Nos. 5 and 12 for a sum of Rs. 350 followed by the sale of item No. 5 on 18th November 1897, 4 months later, for Rs. 850 to discharge the previous mortgage with interest, *viz*, Rs. 364 and certain taxes Rs. 50 making Rs. 414 and leaving unaccounted a balance of Rs. 430 which was alleged to have been borrowed for the repairs of item No. 12. I am prepared to allow the alienation to the extent of Rs. 414 which I think is quite ample to cover any repairs which were at all likely to have been done to either or both of these houses. Besides it constituted an antecedent debt at the time of the sale, and I allow also the taxes which are mentioned in the sale-deed, but still that leaves Rs. 436 unaccounted for,

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Then we come to item No. 10 which was alienated on the 21st August 1901 by Exhibit M. to the 12th defendant for Rs. 200 as to which there was no evidence and I therefore hold it not binding.

The last is item No. 11 a mortgage for Rs. 280 to the 13th and 14th defendants. Rs. 185 of that is admitted to have been an antecedent debt paid to some Koravas. It appears that the mortgage of item No. 12 was paid off under Exhibit E., Item No. 12 itself was afterwards alienated and part of it was sold by the alienee to the Municipality by the alienee at a very handsome price and the evidence is he allowed the 1st defendant to buy back the remainder at a low rate. The balance Rs. 175 of this mortgage of Rs. 280 is said to have been applied in that way. It is not suggested it was applied in any other way and I do not see any reason to doubt that. I am therefore prepared to uphold this alienation in toto.

With regard to the effect of the alienations which I hold to be not binding it is admitted here that under the decision of the Full Bench the alienee at any rate acquired the quantum of interest of the alienors—the first defendant, at the time of the alienation and consequently that in respect of all the alienations when there was only one son, the first plaintiff, the alienee will be entitled to one-half. In regard to the alienations as to item 4 the alienation will be set aside to the extent of one-half. Similarly as regards items Nos. 6, 8 and 9.

Item 10 is binding to the extent of ½, Item No. 11 is upheld altogether. The only one I have partially allowed and partially disallowed is as to Item No. 5. Question as to item 5 reserved for further argument.

The 2nd, 13th and 14th defendants are entitled to proportionate costs. 2nd one set; 13th and 14th one set.

I have now had, the advantage of hearing further argument as to the manner in which I should deal with the alienation by the 1st defendant of item No. 5 which I held to be binding on the whole of the joint family to the extent of Rs. 414. If the alienation were by a widow or a guardian or dharmakarta, in the circumstances of the present case the alienation to a much greater extent than was necessary would be set aside on payment to the alienee of the amount which was held binding. It is, however, contended that this is not the proper way to deal with an

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alienation by a co-parcener where that alienation is only partially binding, because according to the law now established in this Presidency such an alienation is in any event binding to the extent of the co-parcener's share as it existed at the date of the alienation without any liability to increase or diminution by virtue of subsequent changes in the joint family. Consequently it is contended that the alienees in this case acquired a one-third share in the property alienated independently altogether of the sum of Rs. 414 which was held to have been advanced by him for purposes binding on the joint family. As regards this sum—there is a decision in *Marappa Goundan* v. *Rungasami Goundan* [1] before the decision in *Chinnu Pillay* v. *Kali Muthu Pillai* [2] that the alienee is only entitled to the share of his alienor and has no further claim on the shares of the other co-parceners in respect of the sum for which the alienation was rightly made. This view has been dissented from by *Sundara Aiyar* and *Sadasiva Aiyar JJ.* in a very recent case in *Vadivalam Pillay* v. *Natesan Pillai* [3] and does not so far as I can judge appear to rest on any sound principle. It appears to me that the right way to look at it is this: the alienee acquired by the alienation the one-third share of the 1st defendant in this case. That one-third share must of course be burthened with a one-third of the joint liability of the family for Rs. 414; but there is no reason so far as I can see why the shares of the other co-parceners should not similarly be burthened with their proportionate share of the liability and therefore I hold it is binding on them to the extent of 2/3 of Rs. 414, and in the result that the alienee is entitled to the one-third share, plus 2/3 of Rs. 414 as a charge upon the shares of the other co-parceners. I need only allude to the contention which was put forward by Mr. Mahadeva Aiyar and the proportion of the alienee was liable to be affected by subsequent additions to the family. It seems to me that that is inconsistent with the principles laid down in *Chinnu Pillai* v. *Kalimuthu Pillai* [2]. The effect of my decision is this, that the alienees have a one-third share, plus a charge for Rs. 276 on the shares of the other co-parceners and this can be worked out as in a ordinary partition. As regards the defendants other than the 2nd and 13th and 14th they must be directed to pay the costs of the plaintiffs to be distributed among the defendants proportionately to the properties concerned.

1. (1899) I. L. R. 23 M. 89. 2. (1911) I. L. R. 35. M. 47 (F B)
3. (1912) 12 M. L. T. 192.

Vaikuntarama Pillai v. Athimoolam Chettiar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis, and Mr. Justice Sadasiva Aiyar.

Vaikuntarama Pillai minor by guardian Muthammal — *Appellant** (*2nd Defendant*)

v.

Athimoolam Chettiar — *Respondent* (*Plaintiff.*)

Transfer of Property Act, S. 53—Creditors, if includes future creditors—Mortgage during minority—Misrepresentation as to age—No duty to refund in the absence of—Settlement by father—Estoppel by attesting—Transfer of mortgage by father—Effect of—No debt for which the son would be liable—Hindu Law.

Suit on a mortgage executed by the 1st defendant during minority in favour of the third who transferred it to the 4th who again transferred it to the plaintiff. The transfer by the third defendant to the 4th was attested by the 1st after he attained majority. Before the date of attestation, but after he attained majority 1st defendant executed a settlement transferring all his property to his mother and wife on behalf of his minor son stipulating only for maintenance to himself. The finding was that the settlement was intended to be operative but that it was executed by the 1st defendant to defeat and delay creditors.

Held that in the absence of a finding that the 1st defendant had obtained money by misrepresenting his age, there was no duty cast in him of refunding the money advanced and as such the plaintiff was not at the date of the settlement a creditor of the 1st defendant.

Held also Per Wallis J. in the absence of a finding that the settlement was intended to defraud subsequent creditors as distinguished from creditors at the date of the settlement and the plaintiff not being a creditor standing in the shoes of a creditor at the date of the settlement, he would not be entitled to avoid it.

Quaere, even if he stood in the shoes of such creditor he would be entitled to avoid.

Difference between the statute of Elizabeth and S. 53, T. P. A. pointed out

Per Sadasiva Aiyar, J Estoppel only prevents a man from pleading the real state of facts and does not make the false state of facts which the Court has got to assume between the parties to become for all purposes the true state of facts, and so far as the 2nd defendant the son was concerned, no such debt as he was bound to discharge under the Hindu Law, arose at any time even after the settlement by reason of his father being estopped.

Second Appeal from the Decree of the District Court of Tinnevelly in A. S. No. 418 of 1910, preferred against the Decree of the Court of the District Munsif of Tinnevelly in O.S. No. 596 of 1906.

C. V. Ananthakrishna Aiyar for Appellant.

T. R. Ramachandra Aiyar and *M. B. Dorasami Iyengar* for Respondents.

The Court delivered the following

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* S. A. No. 1631 of 1911 — 2nd April, 1914.

Vaikunta-rama Pillai v. Athimoolam Chettiar,

Wallis J.

Judgment :—*Wallis, J* :—This is a suit by the plaintiff on a mortgage executed by the 1st defendant during minority in favour of the third defendant who transferred it to the 4th defendant who again transferred it to the plaintiff. The transfer by the 3rd to the 4th defendant was attested by the 1st defendant after he had attained majority. Before the date of the attestation but after he attained majority the 1st defendant executed a settlement transferring all his property to his mother and wife on behalf of his minor son stipulating only for maintenance for himself. The District Judge has found that the settlement was intended to be operative, but that it was executed by the 1st defendant with intent to defeat and delay his creditors and there is no ground for questioning these findings. But he has also found that the plaintiff was a person defrauded, defeated or delayed by the settlement, so as to be entitled to set it aside under S. 53 of the Transfer of Property Act. From this decision an appeal has been preferred by the son of the 2nd defendant. It has been contended before us that the 1st defendant at the date of the settlement was a debtor of the 3rd defendant for the money advanced to him on mortgage during minority as he was bound to refund it. Where a minor has obtained money by misrepresenting his age, that amounts to fraud and he may be made to refund it, but I think it is now settled that, in the absence of fraud, a refund cannot be ordered. This would appear to have been the rule in England even before the Infants Relief Act of 1874 which makes contracts entered into by minors void by statute as the Contract Act does in India. In England there is an express decision of the point by the Court of Appeal in *Levene* v. *Brougham* [1] and the earlier decision of the Court of Appeal, *Ex parte Jones*, [2] to which Sir George Jessel was a party is, to the same effect. All the cases have been reviewed recently by Lush J. in *Stocks* v. *Wilson* [3] where it is shown on an examination of all the authorities that the ground, on which equity interferes to make a person of full age return money or property which he obtained during minority, is fraud. In that case as in the earlier case of *Ex parte The Unity Joint Stock Mutual Banking Association* [4]

1. 25 Times L. R. 265
2. (1881) 18 Ch. D. 109.
3. (1913) 2 K B 235.
4. (1858) 3 De G. J. S. C. 63 S. C. 44 E. R. 1192.

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fraud was found and a return ordered. As regards Indian cases it seems sufficient to refer to the well-known decision in *Mohori Bibee* v. *Dharmodas Ghose* [1] in which their Lordships held that minors' contracts are void and not voidable and that S. 65 of the Indian Contract Act has no application to them and in which they cited with approval the observations of *Romer, L. J.* in *Thurstan* v. *Nottingham Permanent Benefit Society* [2] "a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature has declared to be void". That is to say in the absence of fraud, an infant is not estopped from pleading minority in answer to a suit for the return of the money advanced to him during minority. This has also been expressly decided by the Allahabad High Court in *Kanhai Lal* v. *Balu Ram* [3]. The finding in the present case is that there was no fraud or misrepresentation by the minor as to his age when he borrowed on a mortgage from the 3rd defendant, consequently he could not then have been ordered to refund and therefore the 3rd defendant was not one of his creditors at the date of the settlement. Both the lower courts, however, have held that this does not debar the plaintiff from setting aside the settlement. The District Munsif relies on the fact that the 1st defendant always treated the 3rd defendant as a creditor, endorsed payments on the mortgage after he attained majority, attested its transfer to the 4th defendant, and lastly admitted the plaintiff's claim in this suit. The District Judge apparently takes the same view. Now as regards the present question, the admission of the 1st defendant during the suit cannot give the plaintiff the right to set aside the settlement as against the 2nd defendant. It has not been found, or contended before us, that the settlement was void on the ground that it was intended to defraud subsequent creditors as distinct from creditors existing at the date of the settlement, and in these circumstances it appears unnecessary to consider whether the plaintiff would be entitled as a subsequent creditor by estoppel of the 1st defendant to avoid it. The plaintiff was not a creditor of the 1st defendant at the date of the settlement. There is no doubt a dictum in *Holmes* v. *Penney*. [4] that where a debtor makes

1. I. L. R. 30 C. 539. 2. (1902) 1 Ch. 1
3. (1911) 8 A. L. J. 1058.
4. (1856) 3. K. and. G. 90 at 100 S. C. 69 E. R. 1035.

a settlement in fraud of his creditors and pays them off and a new set of creditors stand in their places the settlement would be void against them also, but this proceeds upon the language of the statute of Elizabeth, which is for the protection of " creditors or others," not " creditors" only, which words are not reproduced in the Transfer of Property Act; and besides, the plaintiff in this case cannot be said to stand in the place of the creditors at the date of the settlement. In these circumstances I think the plaintiff is not entitled to set aside the settlement and that the appeal must be allowed and the suit as against the 2nd defendant and the plaint second schedule property is dismissed with costs throughout. The memo of objections is dismissed with costs.

Sadasiva Aiyar, J:—I entirely agree. Even if the 1st defendant were estopped by some conduct of his from denying as against the 4th defendant that he (1st defendant) owed money to the 3rd defendant on the mortgage deed, this would not create a real debt on the date when the estoppel arose. Estoppel only prevents a man from pleading the real state of facts but does not make the false state of facts which the Court has got to assume as true (***as between the estopped man and the man in whose favour the estoppel works***) to become for all purposes a true state of facts. So far as the 2nd defendant was concerned, no such debt as he was bound to discharge by the obligation imposed under the Hindu Law on a Hindu son really arose at any time even after the date of the settlement, by reason merely of his father's becoming estopped by the said father's conduct from denying that he owed a debt to the 3rd defendant or to the 3rd defendant's assignee (4th defendant). An estoppel cannot overrule a plain provision of law (See ***Arumugam Chetti*** v. ***Doraisinga Tevar*** [1]. In this case, the plain statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel. The 4th defendant does not actually become a subsequent creditor or a prior creditor, by reason of the estoppel, but the 1st defendant is estopped from denying that there was a prior debt due by him to the 3rd defendant and that estoppel works in favour of the 4th defendant and against the 1st defendant. In this view, it is unnecessary to go into the question whether a future creditor can get rid of a voidable *but real* transfer under S. 53 of Act IV of 1882, that is a

1. (1911) I. L R. 37 M. 38 at p. 44.

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a question on which I feel grave doubts whether the current of authorities is really consistent and whether the observations in some of the decisions are sound and in consonance with justice and convenience.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Ratna Chetti (died) and others ... *Appellants** (*Plaintiff's and 1st Plaintiff's L. R.*)

v.

Narayanaswami Chettiar and others... *Respondents* (*Defendants*)

Ratna Chetti v. Narayanaswami Chettiar.

Hindu Law—Will—Construction—Hindu Wills Act,—Reference to, as embodying rules of justice, equity and good conscience—Vested interest—Devise in favour of widow and nephew—Nephew to take properties on the death of the widow if living amicably—Words of disposition—Absence of—Declaratory relief—Practice as to grant of.

In the absence of any statutory provision governing the construction of wills in the Mofussil, Courts are justified in referring to the provisions of the Hindu Wills Act as embodying the principles of justice, equity and good conscience.

Where a testator (Hindu) made a will in favour of his wife and nephew providing *inter alia* "all my properties should after my death be in possession of my wife herself and she herself should be heir to everything and Muthu Arunachella Chetty (nephew) and my wife should live together amicably as of one family. If the two could not agree and live together amicably, my wife should pay Rs. 4000 and separate him and then my wife should enjoy all the remaining properties with absolute rights. If both of them should live together amicably, Muthu Arunachala Chetty himself should enjoy the properties which remain after the death of the widow."

Held, upon the construction of the will that the nephew who lived amicably with the widow till his death, had a vested interest at his death which could not be defeated by a testamentary disposition by the widow in favour of a stranger.

Held also, neither the widow nor the daughter of the nephew being interested in questioning the disposition, as the daughter was herself one of the legatees and having regard to the fact that the lower Court had given an adverse decision on the question of construction, a decree should be made declaring the proper construction of the will.

Words of disposition which are usually found in wills made in England under legal advice cannot be expected in the wills made by Hindu laymen in the mofussil and the intention to make a disposition should not be negatived merely by reason of the absence of those words.

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* A. No. 249 of 1909. 3rd April 1914.

Ratna Chetti v Narayanaswami Chettiar.

Appeal against the decree of the District Court of South Arcot in Original Suit No. 9 of 1909.

The material clauses of the will in question are set out in the Judgment.

T. R. Venkatarama Sastri for Appellants.

T. R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar and *G. S. Ramachandra Aiyar* for Respondents.

The court delivered the following

Judgment :—One Govinda Chetty executed a will on the 20th December 1877 and died subsequently. It purports to be in favor of his widow and his nephew and son-in-law Muthu Arunachalla Chetty. The latter died in March 1878 : the 2nd defendant is his widow and the third, his widowed daughter. On the 13th December 1908, Sengalani Ammal, the widow of Govinda Chetty executed a will. She died since. Plaintiffs are reversioners to the estate of Muthu Arunachella Chetty. They sue for a declaration that Sengalani was not competent to dispose of the plaint property by her will, that Muthu Arunachella Chetty had a vested interest in it at the time of his death and that they are entitled to succeed to the estate after the life time of the 2nd and 3rd defendants. The District Judge held that Muthu Arunachella Chetty had no vested interest in the property covered by the will, and that the discretionary relief of declaration should not be granted in this case, as the plaintiffs can succeed, if at all, only after the death of the defendants 2 and 3. Plaintiffs have appealed. We are unable to concur with the learned District Judge upon either of the points decided by him.

It has been held in all the Courts in India that a remote reversioner can sue for a declaration when the presumptive reversioner is either colluding with the alienee or is not interested in seeking to set aside the unlawful dealings of the widow in possession. Sengalani's will is partly in favour of the 3rd defendant, and it is clear that neither the 2nd defendant, her mother, nor the 3rd defendant is interested in questioning the disposition made by the deceased. Following *Chidambara Reddiar* v. *Nallammal* [1] we hold that plaintiffs are entitled to bring this suit. Further as pointed out by the Judicial Committee of the Privy Council in *Isri Dutt Koer* v. *Hans Butti Koerain* [2] a pronouncement on the proper construction of

1. (1907) I. L. R. 33 Mad. 410. 2. (1883) I. L. R. 10 Cal. 324 at p. 333.

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Govinda Chetty's Will may have the effect of preventing further litigation. See also *Mon Mohanghosh* v. *Equitable Coy., Ltd.*, [1] and it is all the more desirable as the District Judge has given his decision upon the construction placed on the will. We therefore hold that the suit is not liable to be dismissed on this ground.

The main question for decision is whether Muthu Arunachella Chetty had a vested interest in the property under the will of Govinda Chetty. There are four principal clauses in the will. (1) The preamble says that the will is made in favour of his wife and nephew. (2) It next recites the fact that his nephew has been living with the testator since birth and says. " All my properties, should, after my death, be in the possession of my wife herself and she herself should be heir to everything and Muthu Arunachella Chetty and my wife should live together amicably as of one family. " (3) The third clause provides that if the two could not agree and live together amicably " My wife should pay Rs. 4,000 and separate him and then my wife should enjoy all the remaining properties with absolute rights. " (4) Then comes the final provision which directs that " If both of them should live together amicably, Muthu Arunachella Chetty himself should enjoy the properties which remain after the death of the said Sengalani Ammal. " Apart from any question of technicality, it is clear that the testator did intend to give some property to his nephew. In case of disagreement, he is to be cut off with Rs. 4,000 at the option of the widow; If there is no quarrel he is to be the heir to all the properties ***remaining*** at the death of the widow. Mr. Ramachandrier's argument should lead to the conclusion that even though they lived together amicably it was open to Sengalani to deprive Arunachella Chetty of all rights in the property by disposing of it during her lifetime. This is mainfestly against the intention of the testator. The learned vakil lays stress upon the use of the word ***remaining*** as qualifying the property, and contends that the testator gave the widow absolute power to deal with it, as he did not apprehend that she would act ungenerously towards her own son-in-law. We were at first inclined to hold that the word ***remaining*** was intended to give powers of absolute disposition to the widow. On further consideration, we have come to the conclusion that that expression

1. (1914) 18 C. W. N. 606.

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only refers to the power of alienation for necessary and binding purposes, which a limited owner has under the Hindu Law. It is significant that in clause two of the will, the testator refers to the widow only as heir, whereas in clause 3. he gives her absolute powers of alienation after having paid off Rs. 4,000 to his nephew. Mr. Ramachandrier argues that the use of the word "as heir" indicates that the testator gave the widow all his property as full owner and quotes *Surajmani* v. *Rabinath ogha* [1] in support of it. The will in the Allahabad case provided that the widows should "remain in possession as owners with proprietary powers." The present will does not contain similar words: on the other hand it was laid down in *Radha Prosad Mullick* v. *Ranimoni Dassi*[2] that Hindu Wills should be construed relative to the notions of Hindus respecting the rights of donees under the Hindu law: and in a case very similar to the present one it was held that the use of the word "Malik (owner) did not confer an absolute estate on the widow *Motilal Mithalal* v. *The Advocate-General of Bombay* [3]. The two classes of cases are not in conflict as is often supposed. Where the words of disposition are clear and unambiguous, the sex of the donee will not be a disqualification for acquiring an unqualified estate. But where the words are consistent with the creation of an interest which the law ordinarily gives to females, then the rule of law is that the testator intended to conform to the principles of law by which the parties, in the absence of a testamentary disposition, are governed. Bearing these principles in mind, we must hold that the words "should be heir" in clause 2 were not intended to confer an absolute estate on the widow; especially when the testator in clause 3 does give absolute powers of disposition in certain contingencies: clause 2 only gives the widow that right which she is entitled to under the Hindu Law. Mr. Ramachandrier's next contention is that there are no words of gift in favour of Muthu Arunachella Chetty. It must be remembered that words of conveyance which are usually to be found in wills made in England under legal advice are not to be expected in this country. This will was made by a laymen, and he begins by saying that he is making a will in favour of his wife and nephew and concludes by constituting the latter heir to all the remaining properties on the death of the widow. We cannot

1. (1907) I. L. R. 30 All. 84.
2. (1908) L. R. 35 I. A. 118.
3. (1910) I. L. R. 35 B. 279.

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agree that these two clauses read together do not confer rights of property on Muthu Arunachella Chettiar. The will having been made in a moffusil station, there are no statutory provisions governing its construction. We think we are justified in referring to the provisions relating to wills made in Presidency towns as embodying the principles of Justice, Equity and Good conscience. The provisions of the Transfer of Property Act do not in terms apply to certain classes of leases, and yet courts have been guided by the principles contained in the Act, in deciding these cases. The definitions of *vested* and *contingent* interests contained in the Transfer of Property Act are the same as those of the Hindu Wills Act. We shall therefore refer to the Transfer of Property Act in discussing this justice. S. 19 lays down that where on a transfer of property an interest therein is created to take effect on the happening of an event which must happen such interest is vested. The event contemplated by the testator in the case before us is the death of his widow. It is then that the nephew is to become the owner of the property. The fact that he may be turned out by the payment of Rs. 4,000 does not deprive him of the right to succeed ultimately: (*vide* the last clause of the explanation to S. 19) Mr. Ramachandrier contends that the provisions in favour of the nephew is analogous to the power to appoint mentioned in *Surendra Nath Ghose* v. *Kalachand Banerjee* [1] and that as held by the learned Judges in that case, the nephew had only a contingent interest. The report of that case does not give the provisions of the will, and the learned Judges after taking it as conceded that the will gave only a contingent interest proceeded to say that that interest cannot be attached in execution. That decision affords no guide for the determination of the question before us. Even if the interest created was contingent at the outset, it became a vested interest before the death of Muthu Arunachella Chetty. He had not quarrelled and the widow had not sent him away by paying him Rs. 4,000; at the moment of his death, the happening of the contingency became impossible and he died possessed of a vested interest (*vide* the last clause of S. 21 and S. 26 of the Transfer of Property Act). The condition, if any, to the nephew being entitled to a vested interest was fulfilled by his having lived amicably with the widow till his death. For all these reasons

1. (1908) 12 C. W. N. 668.

we hold that the plaintiffs are entitled to a declaration that the Will of Sengalani Ammal is not binding on the reversioners. We reverse the decree of the District Judge, but as it was necessary to come to Court in order that the testament may be construed properly we direct that the costs of all parties here and in the Court below do come out of the estate. Ratna Chetti v. Narayanaswamy Chettiar.

PRIVY COUNCIL.

Present:—Lords Shaw, Sumner, Parmoor, Sir John Edge and Mr. Amir Ali.

[From the Chief Court of Lower Burmah].

Channing Arnold ... *Appellant*

v.

King Emperor ... *Respondent.*

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Defamation—Defence of good faith and for the public good—S. 499 I. P. C. Exception 9 and S. 52 I. P. C.—Comment on judicial proceedings—Privilege of press—Misdirection to jury—Practice of the Judicial Committee in appeals in criminal cases.

Held that the question for the jury was whether in publishing the libels complained of, the accused acted in good faith and in the belief of their being true, after giving due care and attention to seeing that they were so.

The allegations to which the libel related having been investigated by the Government (prior to the publication of the libel) and the officer whose conduct was called in question having been exonerated from blame, the accused assumed grave responsibility for reopening the matter; and it was well worthy of consideration by the jury that no fresh facts were adduced in explanation of reviving the matter and that the accused gave no assistance to the Court on the subject of what were the actual things upon which he founded his own beliefs nor what the steps were, if any, which he took to investigate their truth before giving them to the public.

Referring to certain portions of the libel which were very gross and which in their Lordships opinion the accused could have had no reasonable ground for believing to be true, their Lordships held that in any view of the case there could have been no defence in regard to these substantial portions of the libellous matter.

The Queen v. *Newman* (1. E. & B. 558) referred to.

When, in the course of the trial, the evidence revealed that in writing the libel, the accused had proceeded on a gross mistake on an important matter of fact, the libel should not have been adhered to for a moment; the mistake should have been acknowledged and an apology, tendered.

A charge to a jury must be read as a whole. If there are salient propositions of law in it these will, of course, be the subject of separate analysis. But in a protracted narrative of fact the determination of which is ultimately left to the jury, it must needs be that the view of the judge may not coincide with the views of others who look upon the whole proceedings in black type. It would however not be in

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accordance either with usual or good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case is being fairly left within the jury's province.

In the region of fact the Judicial Committee will not interfere unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred.

It is a timeworn fallacy that some-kind of privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher.

The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

It is also a dangerous doctrine that some privilege or protection attaches to the public acts of a judge which exempts him in regard to these from free and adverse comment. He is not above criticism, his conduct and utterances may demand it.

Freedom would be seriously impaired if the judicial tribunals were outside the range of such comment.

The position and functions of the Judicial Committee in criminal cases fully discussed.

The Queen v. *Mukerji* 1 *The Falkland Islands Company* v. *The Queen* 2 and *Clifford* v. *King Emperor* 3 refferred to with approval. *Dillet's case* 4 *Makin* v. *The Attorney-General for N. S. Wales* 5 *Pillai* v. *King Emperor* 6 *Lanier* v. *The King* 7 explained.

The position of the Committee is different from that of a Court of Criminal Appeal. It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law, unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale there has been a violation of the natural principles of justice so demonstrably manifest as to convince their Lordships first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided.

The material facts are sufficiently set out in their Lordships' judgment.

Sir Robert Finlay K. C. with *Wilson* and *Page* appeared for the Appellant.

Sir E. Richards, K. C. & Dunne appeared for the Respondent.

Dr. Syed Abdul Majid, [Instructed by Messrs. Bramall and White] watched the proceedings on behalf of the London Islamic Society.

1. (1862) 1 Moore N. S. 272, 15 E. R. R. 709.
2. (1863) 1 Moore N. S. 299, 312, 15 E. R. 718.
3. (1913) L.R. 40 I.A. 241.
4. (1887) L. R. 12 A. C. 459.
5. (1894) L. R. A. C. 57.
6. (1913) L. R. 40 I. A. 193=25 M. L. J. 518
7. (1914) A. C. 221=26 M. L. J. 1.

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Sir R. Finlaly K. C. for the appellant contended that the charge was under S. 499 of the Indian Penal Code and that it was not defamation if it were done in good faith. The whole question was whether Arnold used due care and attention; if so, he was entitled to acquittal. The proceedings were most unsatisfactory and the sentence rather heavy. Let it be clearly understood that McCormick was not being charged with a crime. Arnold it was not suggested had any malice.

[*Sir John Edge*: Arnold does not say how he was informed of it.]

He wrote to the Lieut-Governor first. McCormick said he took the child for the purpose of treating her; but medical evidence was that she could not have suffered from gonorrhoea. The Chief Justice misled the jury as if the charge was against McCormick. The medical evidence was that the child was used in an abominable way and her hymen was ruptured. [*Sir John Edge.* What was the charge?] First abduction and then rape. Prior to the trial the complainant filed a petition before Mr. Buchanan to the effect that the case should be tried by himself and enquired into personally. This was confirmed by the diary of Mr. Buchanan. Fatima the mother stated that she had not parted with the child and wanted her back. She then applied that the child should be examined. On July 13 Sherrard was sent to enquire, who saw McCormick on the next day. He stated that he bought the child. He made two different statements. The diary appeared to be rewritten. Arnold took good care as to what was to be said [*Lord Shaw*:—What you are concerned with is the innocence of Arnold and not the guilt of McCormick] [*Sir John Edge*:—Buchanan's view was that McCormick was a dangerous man,] One could understand the English sentiment on such a state of affairs. Arnold was there a few years. [*Sir John Edge*:—One who had been there so long would not have believed in it.] Fatima wished to have her child, but McCormick would not give her back. On July 18th Finnie arrived. Daulatram's examination went to corroborate the statement of the girl that the rape was committed. [*Sir John Edge* :—There was a ***prima facie*** case of abduction. There is proof that she was with a dancing troupe] [*Ameer Ali* :—that would not mean that she had connection]. Before the discharge ceased Finnie told Daulat Ram

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that he need not take sides. One had a right to complain of the way in which the Judge had tried the case. [*Ameer Ali*:— The letters are on the file] [*Sir John Edge*:—These letters are confidential among the civil service]. Buchanan stated reasons for not agreeing as the defence was that the child was prostituted. The petition that Mr. Andrew should not try the case was sent to him by the commissioner. It was not right to file any petitions of that kind. Besides, objections against his trying the case were taken several times. [*Sir John Edge* :—Is a Magistrate to hold his hand because of a petition? No administration of criminal justice would be possible. I used to receive petitions against every Judge.] It was unfortunate that the trial took place before Mr. Andrew. I had nothing to do with the officials. What I had to show was whether Arnold acted in good faith and with due care. The defendant was represented by a pleader, but the Court called witnesses for the defence. It ought to have been left to McCormick. It looked curious. [*Lord Sumner* :—It is not an adequate reason for not examining Dr. Evers, that discharge had ceased]. Several witnesses were never called. It was not startling that Aina was not suffering from venereal disease. The evidence was just the other way. She never had it. Andrew said she was suffering beyond doubt. Arnold honestly and reasonably believed that a miscarriage of justice had taken place [*Sir John Edge* :—Arnold believed that a Magistrate concocted these]. It was too strong what Arnold believed was a miscarriage of justice, [*Sir John Edge*:—Natives are treated by Europeans. Do you mean to say that Arnold came to the conclusion on all these facts before him?] Yes, that was the impression left on his mind. [*Sir John Edge* : what does your client say against the order? you cannot charge the Magistrate with corruption.] I was not attacking Andrew; he had been on friendly terms with McCormick. Two petitions were forwarded to proper quarters. How would this act upon the mind of a person? After correspondence with the Government when Arnold found that no remedy was possible, he wrote these articles. The trial before the Chief Judge was rather unusual. He made a speech before the trial shutting out a good deal of evidence for the defence. [*Mr. Ameer Ali* : Is it in accordance with practice to make a speech before trial?] [*Sir John Edge* : He confined their attention to what he was going to try. To my mind there is nothing invidious in it]. This must be complained of. In the sum-

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ming up the Chief Judge forgot the difference between the English Law and the Indian Law. [*Sir John Edge*: He was telling them what the English Law was.] Allegation of fact and comment were two different things. [*Sir John Edge*: you are not protected if you make a wanton charge.] Allegation of fact could not fall under exception 9 of S. 499 in India. The citation of the English Law put the jury on a wrong track. The Chief Judge's stricture on Buchanan was not relevant. Arnold must have taken the same view as Buchanan. There was a complete misdirection on the vital point in the case. The Chief Judge in effect said that the charge against McCormick was absurd. It showed a case of prejudice of the most substantial kind. He brought in the very things he excluded, Arnold thought the case fit to be enquired into. The whole of the Chief Judge's summing up was based upon complete misconception. Arnold was not engaged on legal proof but was simply concerned with whether there was a strong case for thinking there had been improper conducting of the case. The jury had no proper charge. He thought that Arnold could not have taken that view, but Buchanan did. It was on the Criminal Court that the poor population must depend. Arnold was writing with a feeling which every one should share. The question was whether his trial was fairly conducted. It was not. Dr. Evers said prostitution of Aina was impossible but the Chief Judge said it was irrelevant and of no value; the effect was that the jury was taken off the track. [*Lord Sumner*: Andrew might have said what was the good of calling witnesses, knowing what they had to say.] Arrest was on warrant and bail on a non-bailable offence was granted to McCormick on his own recognisances. How would it strike an ordinary person? A conviction could not stand when it resulted from such summing up. There were five telegrams which had passed between Mr. Dawson, the commissioner and Mr. Andrew which could not have been before Mr. Arnold. If Andrew had done his duty it was possible for the complainant to get legal advice. [*Sir John Edge*. Do you think Arnold would have drawn the same conclusion as the ignorant Malay woman.] Arnold had also Mahamed Din. He was in the hands of his advocates who might have thought it injurious to give up the facts of the case. The real line of defence ought to have been whether Arnold acted in good faith and with due care, which the Chief Judge ignored. He did not plead justification on the ground of

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truth. There was not a word on the guilt of McCormick. The question was how it might have appeared to Arnold. The Chief Judge went into the charge of McCormick's guilt and said it was false. Even if there were excesses, proceedings were not justified. The question was of the mind of Arnold. Supposing he were misled. If the Chief Judge directly put the question of McCormick's guilt to the jury and said "you as reasonable persons should not believe in it," the point was made. It was very undesirable for Andrew to disregard the petitions being a boon companion of McCormick. There was evidence as to people being turned out of the Court. This was a fit case for the Board to interfere in the interests of justice as had been in the cases decided where misdirection went to the merit of the case and was of a serious nature.

Reference was made to *Makin* v. *Att.-General of N S.W.* [1] *R.* v. *Gibbs* [2] *Rex* v. *Dyson* [3] *Bray* v. *Ford* [4] *Wilson* following pleaded justification and tried to shew that various irregularities must have been intentional.

Sir E. Richards K. C. (with him *Dunne*) for the respondent contended that the appellant had not made out a sufficient case for the interference of the Board. There were attacks on the Judge and any interference by this Board will be wrong. The summing up by the judge will have to be tested not by considering isolated passages but by taking it as a whole and it will have to be considered along with the argument of the counsel on either side. There was no case cited for allowing the appeal on the grounds set forth. To interfere in a case of this kind would be to alter the practice of this Board in Criminal appeals and to allow appeals to this Board on grounds different from those on which alone this Board has been allowing appeals in criminal cases. The practice of allowing appeals here was entirely different. [*Sir R. Finlay*: Leave to appeal was granted and Lord Chancellor was presiding] There were six specific instances in which the conspirators wished to burke justice *viz.*, bail, advocate, interpreter, hearing in camera, not calling witnesses, and the hearing of the case by Andrew himself. There were answers for all of

1. (1894) A. C. 57.
2. (1887) 18 Q. B. D. 537.
3. (1908) 2. K. B 455.
4. (1896) A. C. P. 44 Cf. 5
5. (1909) 25 T. L. R. 617, 625.

them and they could be explained away. The appellant never pleaded justification. Reference was made to S. 537 of the Code of Criminal Procedure.

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Sir Robert Finlay, in reply referred to the cases mentioned in their Lordships Judgment to shew that it was a fit case for interference.

The Judgment of their Lordships was delivered by

Lord Shaw.—By leave granted by His Majesty in Council this appeal is brought from a conviction of and sentence upon the appellant by the Chief Court of Lower Burma, pronounced on the 19th October 1913. The charge was one of defamation or criminal libel, and the prosecution was laid under the 21st chapter of the Indian Penal Code. In that chapter S. 499 gives a definition of defamation, and sets forth categorically no fewer than ten exceptions, any one of which forms a proper defence to the charge. By S. 500 it is provided that the punishment of defamation shall be " simple imprisonment for "a term which may extend to two years, or with fine, or with "both."

The appellant was charged with having defamed Mr. G. P. Andrew, Deputy Commissioner and District Magistrate of Mergui, by the publication of two articles in the *Burma Critic,* a Rangoon newspaper, on the 28th April 1912. These articles were entitled " A Mockery of British Justice."

Mr. Arnold has had experience as a journalist; and it appears from the proceedings that he was at one time the chief editor of the *Rangoon Times.* He ceased to be editor of that journal in the end of September 1911, and in January 1912 he was registered as one of the proprietors and the editor of the *Burma Critic.* The articles bear witness to the writer's possession of great invective and declamatory power; and it ought to be said at once that his motives have not been challenged except in so far as that is necessarily involved in the contention that he published serious libels and did so otherwise than in good faith.

The proceedings against him were initiated on the 11th June 1912 by Mr. Andrew, the District Magistrate already mentioned. On the 3rd October 1912 the trial of the case began before *Sir Charles Fox,* the Chief Judge, with a jury. It was protracted

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and lasted from the 3rd to the 19th October. On the latter date the jury returned a unanimous verdict of guilty, and a sentence of one year's simple imprisonment was pronounced. The Board were informed that after undergoing four months' imprisonment the remainder of the sentence was remitted.

Their Lordships listened to a lengthy argument in support of this appeal, during which the entire history of three stages of proceedings or sets of circumstances was discussed. These were, first, the details of the conduct of one McCormick, a planter, who was charged with having abducted and committed rape upon a Malay girl of about 11 years of age ; secondly, the conduct and proceedings of Mr. Andrew as District Magistrate at the investigation which was conducted before him into this charge and which ended in his declining to commit McCormick for trial; and thirdly, the proceedings at the trial in the present case.

From one point of view the discussion might have been greatly shortened by the exclusion of the consideration of the two first elements mentioned. But their Lordships were unwilling, in view of the importance which is said to attach to the appeal, to adopt any step which would appear to prevent the fullest statement by the appellant's counsel of his entire position. And secondly, it has to be admitted that Sir Robert Finlay was justified in his observation that, although there was no justification of the libel pleaded still the circumstances demanded a prolonged investigation on this other issue, namely, whether the appellant, from the material placed before him when he wrote the libel, was acting in good faith. If he did so act he would stand within the exception under the Indian Penal Code, and the libel, otherwise unjustified, would be excused by Statute. In these circumstances the fullest investigation was permitted to take its course.

It is now important to see what are the provisions of the Penal Code which apply to the case.

" Whoever, says Section 498 of the Indian Penal Code, "by words either spoken or intended to be read, or by signs or "by visible representations, makes or publishes any imputation "concerning any person intending to harm, or knowing or having "reason to believe that such imputation will harm, the repu- "tation of such person " is said, " except in the cases hereinafter

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"excepted, to defame that person." Of the ten exceptions under the section three were mentioned. The first exception is in these terms: "It is not defamation to impute anything which is "true concerning any person if it be for the public good that "the imputation should be made or published. Whether or not "it is for the public good is a question of fact." It was admitted by the counsel for the appellant at their Lordships' bar that their client claimed no benefit under this exception: he did not suggest that the series of libels or any one of them was true; on the contrary all of them in so far as they were assertions of fact were admitted to be false.

In point of form the same course was taken in the Court below. But while this was so and while the plea of veritas was not openly or plainly made, their Lordships regret to observe that surreptitiously it did appear and reappear in the case by way of repeated innuendo. It may be as well to bring this matter to a point at once. In Sir Charles Fox's charge to the jury this passage occurs: "'You will observe that under the " first exception the only question, apart from the question of " the public good, that could arise was whether what had been " said was true or not. Now it is noticeable that the defence " does not rely on that exception, although up to the end we " have had it reiterated that what was said was true." Upon being questioned the learned counsel for the appellant frankly admitted that the exception was not in point of fact pleaded as a defence, and their Lordships do not understand that they disputed that the learned Chief Judge's statement of what occurred at the trial by reiterated innuendo was correct. It was open to the appellant to defend his utterances as true. But he declined to take that course. Their falsehood stood as an admission in the case, the words themselves being so plainly of a libellous character. This part of the case may accordingly be definitely dismissed.

The second exception is in these terms: " It is not defama- " tion to express in good faith any opinion whatever respecting " the conduct of a public servant in the discharge of his public " functions or respecting his character so far as his character " appears in that conduct, and no further. " The distinction between this and the first exception is that the former deals with allegations of fact, and this second exception deals with the

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expression of opinion. This also has nothing to do with the case as it now stands, because it was as it must be, admitted that the articles did not confine themselves to expressing an opinion as to the conduct of Mr. Andrew, but in much detail made definite defamatory allegations of fact against him.

It is accordingly upon the ninth exception that the determination of the present appeal solely depends. That is in these terms:—" It is not defamation to make an imputation on the " character of another provided that the imputation be made in " good faith for the protection of the interest of the person " making it, or of any other person, or for the public good." In connection with this exception it is necessary to take its language along with that of S. 52 of the Code, which is to this effect: " Nothing is said to be done or believed in good faith which is " done or believed without due care and attention. "

Notwithstanding the elaboration of the arguments and the introduction of much matter affecting the conduct of McCormick and the conduct of Mr. Andrew, it was accordingly this question, and this question only, which the jury charged by Sir Charles Fox had to try, namely, whether in publishing the libels admitted to be false Mr. Arnold did so in good faith because he believed them to be true, having given due care and attention to seeing that they were so. If the jury were satisfied that he did give that due care and attention, and that he acted in good faith, then the exception formed a good defence, and the accused would be found not guilty. If, on the other hand, they were not so satisfied, then no course, according to the Indian Criminal Law and the Indian Evidence Act, was open to them but to negative the exception and to find the accused guilty. No question is made that each of these propositions is sound.

It is contended, however, by the appellant that in the course of the charge there was misdirection by the Judge, and that the jury's minds were diverted from this, which it is admitted was the true and only issue, to other questions. What were these? They were the very things which the prisoner's counsel had throughout the trial insisted on introducing, namely, the question of the conduct of McCormick and of Mr. Andrew, the narrative as to Mr. Andrew being accompanied by the suggestion that it was after all indefensible and corrupt. Their Lordships recog-

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nise that this mode of conducting the defence, which it appears to have been difficult to repress, was not unlikely to lead to confusion but it is at least satisfactory to find that the learned Judge in charging the jury made no mistake in stating what the true issue was. It is admitted by the appellant's counsel that this is so. " What you will have to consider," said the learned Judge to the jury, is " whether the imputations in these articles were published in good faith, after due care and attention had been exercised on the part of the writer of them. What is 'due care and attention' must depend on the circumstances of each particular case." It is also fair to the learned Judge to say that while he felt constrained—a course which, in view of the conduct of the defence is not to be wondered at—to go with some fulness into a narrative of fact, he concluded his charge to the jury by bringing their minds directly back to the exact issue which they had to try. He did so in this language: " It is now for you to consider " these matters, and to decide whether the accused has satisfied " you that he used the reasonable care that he ought to have used. " If you are satified that he did, and that he did not overstep the " bounds of law as I have explained the law to you, then you " must acquit him, but if he has not satisfied you that he has " exercised such due care and attention before he committed " himself to paper in this way, then it is your bounden duty " to convict him."

Before the exception and alleged misdirection of the jury are dealt with, it is expedient to state what the libel contained. Being headed "A Mockery of British Justice" after a considerable amount of inflammatory matter it proceeds to " speak out "against those officials who have forgotten their duty and have " dared to trifle with the fair fame of England." Having made " these very serious allegations the appellant added : " The facts " before us indicate that he (Mr. Andrew) conspired with Mr. " Finnie to burke the case; that he conducted it *in camera*; that " he refused to heed the protest of the complainants that the " interpreter employed was a paid parasite of McCormick, and " did, in fact, deliberately mistranslate; that of the witnesses " for the prosecution only those called by the District Superin- " tendent of Police, and not even all of them were allowed to " give evidence; that in a word the whole enquiry was an

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"outrageous make-believe and a mockery of what he is nominally "representative, the fair play and judicial honour associated "with the name of England. By what looks like the meanest of "tricks, the unfortunate complainants were unrepresented by any "lawyer at this judicial farce."

It would serve no good purpose to cite further from the libels; they mention disgusting details and incriminate other officers besides Mr. Andrew, as engaged in a corrput plot. They contain not one, but a serious of libels of the grossest character. These libels were at least seven in number. First, of conspiracy with Finnie to prostitute justice by saving McCormick. Secondly, of having apparently knowingly and as part of the partisanship, bailed out McCormick for a non-bailable offence. Thirdly, of having misled the Malay girl, her parents and friends, by leaving them without professional advocacy, which they had been led to expect. Fourthly, of having perverted the course of truth by a partisan interpreter. Fifthly, of having tried the case *in camera*. (Very little was made of this in argument.) Sixthly, of not having called certain witnesses in the inquiry; and Seventhly, of Mr. Andrew having heard the case knowing that certain people objected to his doing so

Of the libels the first was the real basis of all. It imputed corruption. Several of the others might not appear but for their resting upon that basis of corruption to be of so serious a type. But in their Lordships' opinion this cannot be said of the third and fourth, for if it were true that the magistrate had designedly deprived the complainants of legal assistance, and provided them with a false interpreter, then such wicked conduct would not only be itself indefensible but would colour all the rest. Upon the whole it cannot be denied that if any substantial part of this defamation was true, it meant ruin to the career of Mr. Andrew and any others engaged in conspiring with him as alleged.

The points put forward in the appellant's favour as establishing that although the charges were false yet he was excused by statute because he believed them *bona fide* and had given due care and attention to their truth, were substantially three. In the first place it was urged that he relied upon a letter published with the signature of "Vigilance," and addressed to the *Rangoon Times*. It is dated the 31st August 1911, and at that time the appellant was connected with that paper. It contains a long

narrative incriminating McCormick and also Mr. Andrew and others.

The second element proponed in support of Mr. Arnold's good faith is of a different and an important character. It is this: In the district of Tenasserim referred to, the position of Subdivisional Magistrate was occupied by Mr. Buchanan. It is alleged that Mr. Buchanan had been on unfriendly terms with McCormick, but their Lordships do not think that there is anything substantial in this allegation, and they further think it right to put on record their opinion, which is in entire concurrence with that of the Chief Judge, that Mr. Buchanan in his investigations and conduct was actuated by entire good faith. Although his conclusions and suspicions may have been erroneous, their Lordships see no reason to think that from beginning to end he did not act in accordance with the best traditions of the service. He had been absent on leave from the middle of April to about the middle of May 1911, and on his return he heard rumours of misconduct by McCormick. Towards the end of June Mahomed Din, who had had legal differences with McCormick, made allegations which amounted to a charge that the crimes of abduction and of rape had been committed. Mr. Buchanan himself made enquiries and came to the conclusion that McCormick should be put upon his trial. It is a point in the accused's favour that the Sub-divisional Magistrate thought that there was a case for committal.

The third point in these protracted proceedings, which is more important than either of the foregoing in support of the contention that the writer of the libels believed them to be true, is the admitted conduct of McCormick himself. Their Lordships do not attach much weight to the question of abduction, because it appears to be the case that the child had formerely lived in McCormick's house for a short period, and the evidence is somewhat confused as to the conduct of the mother of the child in regard to her absence from the house. But the allegation made by McCormick was that he had been informed that this child was suffering from gonorrhœa, that he had taken her to his house and himself (there being a hospital eight miles away) had personally examined her, and had then passed her on for treatment by the mistress of one of his male servants. But their Lordships find themselves in entire agreement with the

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learned Judge when he says: "It is not surprising that there "should be indignation and hot feeling on the part of the "sympathisers with the mother of the child Aina, and good "reason for feeling of indignation at some of the conduct—the "admitted conduct—of McCormick. However stong "his inclination for amateur doctoring may have been, there could "have been no justification for that. It was a thing that no "man with a proper sense of decency should have done."

Although accordingly it is no part of the submission of the Counsel for the appellant at their Lordships' Bar that McCormick was guilty, their Lordships think it is an element relevant to the consideration of whether Mr. Arnold was acting in good faith in these libels to shew that he believed that McCormick's own admissions would have justified his committal for trial.

The last matter which their Lordships reckon to be a perfectly relevant one in the category of elements in the case which bore upon the point of the accused's good faith was this. Importance is attached to a pronouncement by the Magistrate. After investigating the facts, and declining to commit, he went on to say that in his opinion McCormick's conduct was pure and philanthropic. Their Lordships cannot agree with such an opinion, and their views coincide with those of the Chief Judge upon that subject.

They are of opinion that there were thus several elements in the case which were all with perfect propriety submitted to the jury in support of the defence. Their Lordships, however, do not attach so much importance to the other allegations. That as to bail having been granted to the accused rests on a slender foundation. It is held by the Judges on the spot, and it was proved to be also the opinion of the civil authorities, that the discretion of granting bail applied to this case. It was evidently a case, unless forbidden by Statute, for discretion being exercised, and it would rather appear to their Lordships looking to the great distance to be traversed before the authority claimed by the appellant as requisite for granting bail could be obtained, that much practical hardship would ensue to prisoners unless such a discretion existed. They are not prepared to say that the humane view which was taken of an accused's rights was mistaken. It is unnecessary in this case to decide or dwell upon the point, because thier Lordships'

opinion is very clear to the effect that this difficult and delicate point of law could never have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel. The same observation applies to the other elements in the case which need not be entered upon but all of which have been fully considered. Their Lordships are of opinion that a fair and statable case in support of the statutory defence and of the belief in the wickedness of Mr. Andrew was put forward on the points which have been already enumerated, but that no others were of any real weight. In putting forward, however, the points mentioned, their Lordships think that a case was made which demanded an answer.

Such an answer was given, and it also was both fair and statable.

In the first place a serious and weighty reply was made on the subject of the letter signed "Vigilance." It was not confined to the remark that the letter was no valid excuse for a belief in gross slander. The points proved were these: When that letter was received by the *Rangoon Times* a most proper course was taken, and that with the appellant's knowledge. It was forwarded by Mr. Stokes, the assistant editor, to the Chief Secretary to the Government of Burma, so that there might be official confirmation of its allegations prior to its being published. These allegations were examined into, and on the 31st October the Chief Secretary wrote stating that the Lieutenant-Governor had caused inquiry to be made and had found that the allegations against the officers were without foundation. By this time the appellant had ceased to be editor of the *Rangoon Times*, but on the 2nd November 1911 Mr. Stokes forwarded a reply to the Chief Secretary stating that the incident, so far as the *Rangoon Times* was concerned, was closed.

This was not so, however, with regard to the appellant, for in the following spring, namely, on the 7th March 1912, an article appeared in the *Burma Critic*, of which he was then editor, entitled "Alleged Grave Scandals in Tenasserim." On inquiry being officially made of the appellant, asking for particulars, the answer given was that the case referred to was that

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inquired into and disposed of in the previous autumn. The appellant's attention was at the same time called to the fact that Mr. Stokes had accepted the reply of the Lieutenant-Governor. All this took place before the libels in question were published.

Their Lordships cannot see their way to hold this part of the appellant's case to be satisfactory.

An investigation in the department of a Lieutenant-Governor of great experience having resulted in exonerating Mr. Andrew from blame, the appellant assumed the grave responsibility for re-opening the matter. He gave the authorities inkling of any fresh information which had come to his hand, and in answer to their enquiry he simply stated that it was the old incident which he was reviving. Up to the present the appellant has not given at their Lordships' Bar or in any Court any statement of any fresh facts which he had discovered. This circumstance was, in their Lordships' opinion, well worthy of consideration by the jury.

In the second place, both Judge and jury had seriously to consider the attitude of Mr. Arnold himself. He neither defended the articles as true nor did he give any assistance on the subject of what were the actual things upon which he founded his own beliefs nor finally upon what the steps were, if any, which he took to investigate their truth before giving them to the public.

Thus, although the true issue in the case was as to his own *bona fides* and the care and attention which would verify that, Mr. Arnold's action when charged gave no help to the Court and must to some extent have embarrassed even his own defence. Having admitted that he assumed responsibility for the articles, he was asked by the Magistrate as follows: "*Q*. Do "you wish to make any explanation of your position in the "case as to your *bona fides*, &c.? (I pointed out to the "accused that, under Section 105, the burden of proof lies "upon him)." "*A*. No. I have nothing to say. Everyone from "the Lieutenant-Governor downward, knows my character, "and I leave it at that." But of course it was quite impossible to leave it at that, because the libels were there, in all their number and seriousness; the charge was made under the

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Statute, and the law had prescribed that the author of such libels could only be excused by showing good faith after due care and attention. It is not in accordance with the due or proper administration of justice for an accused to brush all the statutory regulations affecting his position aside in this manner. The attitude and absence of the accused may well have been considered by the jury rather destructive than helpful to the defence set up.

In the third place, this has to be borne in mind. Every officer, judicial or administrative, who investigated this case, except Mr. Buchanan, had agreed with the conclusion at which Mr. Andrew had arrived, namely that the charge should be dismissed. This circumstance was one peculiarly suited for the appraisement of a local jury.

The next circumstance in the case is one to which their Lordships do not conceal that they attach serious importance. They were moved by the allegation that the prosecutors and those in that interest were alleged to have been led on to the trial by Mr. Andrew, and that Mr. Andrew had wickedly conspired suddently to leave them in the lurch without an advocate, and to furnish them with a false interpreter. This allegation was, as it turned out, not only untrue, but was, as was made abundantly clear at the trial, particularly cruel. Letters were produced showing that instead of Mr. Andrew having taken up such an attitude, his desire, and indeed his endeavour and entreaty, throughout were that in the enquiry before him an advocate should not only be employed for the prosecution, but should, in fact, be paid by the Government. Letter after letter was written to his effect—to engage a pleader. On the 3rd August 1911, Mr. Andrew had intimated to Mr. Buchanan that he would engage an advocate to prosecute, and that his presence and the presence of Mr. Sherard, the investigating officer, would also be required. On the 4th he specially wrote to Mr. Buchanan," Can you bring "up interpreter trusted by all parties? Ask complainants to " choose between, two advocates named. "to conduct their case." On the 7th, Mr. Buchanan having been unable to get such an interpreter, but having stated that the complainant wished to consult a certain vakil in Rangoon before choosing a lawyer to conduct the case, Mr. Andrew wrote to Mr. Buchanan, "Kindly

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" do so, and name advocate early. As regards interpreter, your " Court interpreter must come along to assist at any rate." On the 10th sanction was asked to engage Mahomed Ayoog " on the " terms he asks." It most clearly appears from the letters that the arrangement as to legal assistance broke down, because upon the 12th August the Commissioner at Mergui declined to sanction the proposal to retain an advocate, he having demanded of Mr. Andrew to state whether he thought the charges could be substantiated, and Mr. Andrew having stated in answer to this difficult question that he thought the abduction charge alone could be made out. In short the refusal to provide an advocate was made neither by Mr. Andrew nor by connivance or consent of Mr. Andrew, but in spite of him. With regard to the interpreter it should also be added that Mr. Andrew's anxiety upon that subject was manifest, and it was entirely in the right direction. Mr. Buchanan objected to one Chean Gee and he recommended Musaji. As mentioned Mr. Andrew wanted an "interpreter trusted by all "parties" and Musaji, Mr. Buchanan's nominee, was employed. Mr. Buchanan was present at Mergui during the investigation and he made no objection to this. There was, of course, no proof that a single word was interpreted falsely. In their Lordships' opinion these two parts of the libel were very gross, and they can see no justification for the proposition that the appellant had any reasonable ground for believing them to be true.

It does not appear that in any view of the case there could have been a defence under the Statute in regard to these substantial portions of the libellous matter, and the case of *The Queen* v. *Newman* [1] was founded upon to this effect. But their Lordships are very anxious, however, not to have the case disposed of on what may be considered a narrow ground. They take these points as included in the sum of the matter to be considered before the jury as relevant to the general case of Mr. Arnold's justification on the ground of having, after due care and attention, and so in good faith, belived that these things were true.

One final matter has, however, to be kept in view. Some of the letters last cited were undoubtedly not before Mr. Arnold when he wrote the libels. But they were before

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1. E. and. B. 558.

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him in the course of his trial. In their Lordship's opinion, when it was discovered that the truth with regard to Mr. Andrew had not been that in these particulars he wickedly conspired to defeat justice, but that he was, on the contrary, anxiously endeavouring to secure that justice should be furthered and guarded, then the duty of the accused, Mr. Arnold, was plain. Their Lordships make every allowance for the heat of advocacy which, as noted by the Chief Judge, seems to have been in this case great. But when a gross mistake of that kind on a matter of fact—the truth of which when exposed would have ruined any administrative or judicial officer's career—was discovered, the libel should not have been adhered to for a moment. The mistake should have been acknowledged and an apology tendered. This was not done, but upon the contrary the case was conducted to its close upon the footing that an unstated defence was the real and good defence namely that the libels and all the libels were true. Nobody is to be blamed in these circumstances for thinking that the plea of good faith on the part of Mr. Arnold has sustained a serious shock.

The speeches of the learned counsel for the accused have not been printed, but their Lordships had the advantage of hearing Mr. Wilson, who has been in communication with those engaged in the case and who informed their Lordships that the views presented by the senior and junior counsel for the appellant somewhat diverged. It is, however, unnecessary to labour this matter, because no doubt was thrown upon the narrative of the proceedings given by Sir Charles Fox in his charge. There is enough disclosed in the case to show that no light task was thrown upon the Judge in disentangling relevent from irrelevant topics and in presenting the true issue to the minds of the jury. The real objection taken at their Lordships' Bar to this charge was that the jury were misdirected in this sense, and that the narrative of the learned Judge must have left the impression upon the mind that Mr. Andrew had not acted wickedly as the libel alleged. But it was, looking to the advocacy, necessary for the learned Judge to state his own view, and their Lordships do not see anything in the charge to give countenance to the idea that he withdrew this question from the jury or from their province. With a large portion even of the narrative their Lordships see no occasion to quarrel. Some portions of it here and there might be the subject of difference of opininon.

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A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province. Their Lordships do not say that upon any particular in this case they would differ from the views laid down by Sir Charles Fox, but these observations are made in order to discountenance the idea that in the region of fact, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred, this Board will interfere. The separate and peculiar position of this committee under the constitution will be afterwards dealt with.

Their Lordships regret to find that there appeared on the one side in this case, the timeworn fallacy that some kind of privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute-law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

Upon the other side it would appear from certain observations of the learned judge that this false and dangerous doctrine may have been hinted at that some privilege or protection attaches to the public acts of a judge which exempts him in regard to these from free and adverse comment. He is not above criticism. His conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment. The present case affords a good illustration of what is meant. When the exami-

nation before Mr. Andrew concluded with his declaration that in his judgment the action of McCormick was pure and philanthropic, the whole trial would seem to have been laid open to searching and severe observations, and no blame could be attached to these. But when the criticism was converted into an attack upon the Magistrate as a conspirator against justice, a traitor to his oath, a trickster, a man who had manouvred his procedure so as to defeat truth and protect an associate then of course, it is for the person who has uttered these things to justify them, or under the Indian Penal Code, to establish affirmatively that he believed them to be true, and that on reasonable grounds. On both of these matters last mentioned the learned judge seems to have properly directed the jury.

This also has to be said. A large part of the criticism directed against the charge of the learned judge in this case was to the effect that the narrative of the proceedings led up to the conclusion inevitably that Mr. Andrew was innocent of the wicked dereliction of duty which was alleged. If it was so, the result upon the case is somewhat remarkable. For then the charge had in fact impressed the jury's minds with the innocence of Mr. Andrew and it is that very innocence which is in the foreground of the admissions made in this case. The foregoing narrative in this view might have been spared, because it is now seen that nearly all, if not all, of the items in the narrative which are said to constitute misdirection are parts of a narrative which leads to a conclusion that is in accordance with fact which has all along been admitted to be true.

It is here that the peculiarity of the procedure becomes evident, for the narrative thus criticised was undoubtedly, as it appears to their Lordships, the narrative given by the learned Judge to the jury in order to counteract an improper use which was being made of the procedure. While the truth of the libels was not asserted formally, and while the admission of their falsehood was formally granted, an endeavour was repeatedly made to withdraw all this and to persuade the jury to take all that was asserted as true. Such things may occur but it is the duty of Judges to put what check they can upon them, and in the present case their Lordships see no occasion to think that the learned Judge failed to exercise that duty with propriety.

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From what has been said it will, their Lordships think, clearly appear that there was material before the jury on both sides of this case, and that the determination was on a subject peculiarly within the jury's province. In their Lordships' opinion the case was not improperly withdrawn from the jury's domain on fact, and they were not misdirected in law. But even if it were conceded that upon a meticulous examination of the Judge's charge or conduct of the case certain flaws could be discovered, it is the duty of their Lordships to consider the special position and function of the Board, in criminal cases as the advisers of the King. The frequency of applications made to the Board for leave to appeal against the judgments of criminal tribunals in various parts of the empire, as well as the thoroughness with which the powers and practice of the Judicial Committee were discussed in this case incline their Lordships to make a deliberate survey of this important topic.

The question is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by Statute is undoubted. Upon the other hand there are reasons both constitutional and administrative which make it manifest that this power should not be lightly exercised. The over-ruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction by an appeal to the Royal Prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions.

These views are not new. They were expressed more than 50 years ago by Dr. Lushington in his judgment in *The Queen* v. *Mukerji* [1] and Lord Kingsdown, in the case of *The Falkland Islands Company* v. *The Queen* [2] stated the matter compendiously in these words: "It may be assumed that the Queen as authority "by virtue of Her Prerogative to review the decisions of all "colonial courts, whether the proceedings be of a civil or cri- "minal character, unless Her Majesty has parted with such "authority. But the inconvenience of entertaining such appeals

1 (1862) 15 E. R. 704 1 Moore N. S. 272.

2. (1863) 15 E. R. 713 1 Moore N. S. 299 at 312.

"in cases of a strictly criminal nature is so great, the obstruction "which it would offer to the administration of justice in the colonies is so obvious that it is very rarely that applications to "this Board similar to the present have been attended with "success." Their Lordships desire to state that in their opinion the principle and practice thus laid down by Lord Kingsdown still remain those which are followed by the Judicial Committee.

There have been various important cases in recent times to which, naturally, reference has been made. The first is the case of *re Dillet* [1]. It should be observed that while Dillet's case was in form an application within the ambit of criminal law, the matter of substance which was truly brought before the Judicial Committee was a civil matter. The appeal was by a barrister and solicitor against a verdict convicting him of perjury, but there had been a consequential order of the Court directing him to be struck off the roll of practitioners, and special leave was granted to appeal in reference to the consequential order. Lord Blackburn referred to *Lord Kingsdown's* judgment in the Falkland Islands case as authoritative and binding. After citing that learned Judge, *Lord Blackburn* added: In " this statement of the general practice their Lordships agree. They "are not prepared to advise Her Majesty to make this conviction " for perjury an exception if it were not made the sole foundation "for the subsequent Order of the 27th March 1885, and liberty "accordingly was granted to appeal against the order of the 27th "March 1885, striking him off the roll, and also to the extent " above stated, and no further, against conviction for perjury."

While accordingly the familiar sentences again about to be quoted from Lord Watson are frequently cited with reference to criminal review in general by this Board, this outstanding circumstance just alluded to ought not to be forgotten. It appears to dispose of the argument that the practice of the Board was in purely criminal matters in any respect either advanced or distorted from the position that it occupied under the judgments of Dr. Lushington and Lord Kingsdown pronounced about a quarter of a century before. *Lord Watson in Dillet's case* observed that " the rule has been repeatedly laid down and has been invaria- " bly followed that Her Majesty will not review or interfere " with the course of criminal proceedings unless it is shown that

1. (1887) 12 A. C. 459.

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" by a disregard of the forms of legal process or by some violation " of the principles of natural justice or otherwise substantial " and grave injustice has been done."

The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been a misdirection in any criminal case, leaving it uncertain whether that mis-direction did or did not affect the jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect: It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The limited nature of the appeal in *Dillet's* case has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

The argument for the appellant was to an entirely contrary effect. In the forefront of it the case of ***Makin* v. *The Attorney-General for New South Wales*** [1] was cited. Makin's case in truth did not raise the question at issue in the present case. It depended upon the construction of S. 423 of the Criminal Law Amendment Act of 1883 (a New South Wales Statute).. That section set up the judges of the Supreme Court as a tribunal to determine questions submitted to them in a case stated by the Judge at the trial, and there was a proviso that there should be no quashing "un-" less for some substantial wrong or other miscarriage of just-

1. (1894) A. C 57.

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"ice. It was stated by this Board that under that section the "Judges have not been substituted for the jury. As they said, "In "their Lordships' opinion substantial wrong will be done to the "accused if he were deprived of the verdict of the jury on the facts "proved by legal evidence and there were substituted for it a verdict "of the Court founded merely upon the perusal of the evidence."

The second case founded on is that of *Pillai* v. *The King-Emperor* [1] in which this Board sustained an appeal. The circumstances of the case, however, were of the most extraordinary character, and were such as appeared to the Board imperatively to demand that it should interpose, because the very foundations of justice seemed to have been attacked in the proceedings. A whole body of inadmissible evidence had been received in the case. The one witness whose evidence was relevant and who remained in the case was supporting another witness who was a confessed perjurer. The remaining witness himself had given under oath conflicting and contradictory accounts in previous judicial proceedings before the Magistrate aud certain officials". If true," observed Lord Atkinson, they show that officials, or at least the Sub-Inspector, induced the witness to forswear himself and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father; and if false they show that the witness was ready to commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements. There is no alternative." The simple case accordingly confronting the Board was a case of a subject sentenced to death upon no evidence at all. In these circumstances, although the principle of *Dillet's* case was again re-affirmed, their Lordships did not see their way to refrain from interfering.

The third case referred to is that of *Lanier* v. *The King* [2] and, fortunately, it is seldom that such a travesty of justice can be witnessed. One of the notable features of the case had reference to the Judge himself. He, as narrated in the report, was a member of the family council which instigated the proceedings and himself was a party to appointing two barristers to conduct the prosecution and arranged about their fee. The facts need not be referred to. The indictment was altered by drastic amendments; the trial was hurried on; but the narrative need go no further, for, as the report states, "In short, counsel "for the Crown at the Bar of this Board very properly admitted

1. (1918) L R. 40, I. A. 198 S. C. 25 M. L. J. 518.
2. (1914) L. R. A. C. 221=26 M.L.J.

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"that he could not contend that any jury upon the evidence "submitted would have convicted the appellant of Crime." The Board were of opinion that the sentence pronounced against the appellant "formed such an invasion of liberty and such a denial "of his just rights as a citizen that their Lordships feel called upon "to interfere," But the Board took care to repeat that it did not lightly interfere, and the language of Lord Watson in *Dillet's* case was again cited. It was pointed out that the interference was not on any matters of form, but because of matter lying at the very foundation of justice (the judge had been a judge in his own cause), justice had "gravely and injuriously miscarried." Lanier's case stands as a fair type of almost the only case in which this Board would advise the interposition of His Majesty the King with the course of criminal justice in the colonies or dependencies. That extreme case is this, that it must be established demonstrably that justice itself in its very foundations has been subverted, and that it is therefore a matter of general Imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the empire.

Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England; but they are not the rules adopted by this Board which already stated, is not a Court of Criminal Appeal. And the authority of these decisions which apply to a different system a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty. This view is in entire accord with the recent proceedings of this Board on applications for leave to appeal. One instance of this is that of *Clifford* v. *The King-Emperor*, [1] on the 17th November last, and their Lordships refer to the Judgment of the Lord Chancellor in this and the other refusals referred to.

The application to the present case is simple. Even had this Committee been a Court of Criminal Appeal it is hardly doubtful that the appeal would fail. *A fortiori* their Lordships are left in no doubt as to their own duty in conformity with the practice of the Board. They will humbly advise His Majesty that the Appeal be dismissed. There will be no order as to costs.

Solicitors for the Appellant. *Messrs. Bramell and White.*
Solicitors for the Respondent. *Solicitor India Office.*

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1. (1918) L. R. 40 I. A. 241.

PRIVY COUNCIL.

Present:—Lords Shaw and Moulton and Mr. Ameer Ali.

On Appeal from the High Court at Bombay.

Chunilal Parvatishankar *Appellant.*

v.

Bai Samarth *Respondent.*

Chunilal Parvatishankar *v.* Bai Samarth

Will—Made by a Hindu—Construction—Self-acquired property—Costs—Hindu Wills Act of 1870 *Ch.* 21—*Intention of testator.*

Where a Hindu had made a will in respect of his two sons in respect of his self acquired property, and had said in the Will—Should either of these two sons die without having had (leaving) any male issue, the survivor......is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue after undertaking (to defray) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters ".

Held that the testator had clearly in view the survival of the testator by his two sons and the death of one of the sons leaving a widow and daughters but no male issue and therefore the appellant as such surviving son was entitled to the estate conveyed by the will and that the correlative obligations resting upon him came into play for which he must give security to the High Court.

Held, further that in the construction of Wills there was nothing specifically either English or Indian in the idea that the Will of the testator must be construed on that principle which would enable Courts of Law most fully to give effect to the intention expressed by his words......and that in ordinary circumstances ordinary words must bear their ordinary construction and the whole Will, that is, the whole of the words employed by the testator must be looked at together so as to determine his whole intention.

Held also that in view of the special difficulties in the construction of the Will the costs to be paid by the appellant throughout.

O'Mahoney v. *Burdath* 7 English and Irish Appeals 388 which corrects the case of *Edwards* v. *Edwards* 15 Beav. 357 and is supported by *Allen* v. *Farthing* in *Jarman on Wills* (6th Ed. 2160) approved.

Appeal from a Judgment and Decree of the High Court dated July 20, 1910 reversing decrees, of the two lower Courts dated respectively Feb. 4, 1907 and August 27, 1908.

Parvatisankar, a Hindu resident of Surat died in July 1901 leaving a considerable property and two sons, Shambhuprasad and Chunilal who were joint with him and one grandson the son of his pre-deceased son Surajlal who had separated from his father many years before. He made a will in favour of his two sons. They divided the property between themselves, Shambhuprasad dying in 1903 leaving no male issue but a widow and a daughter. Chunilal then filed a suit in the court of the first

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class Subordinate Judge claiming a declaration that he was entitled to the property in possession of the late Shambhuprasad by virtue of their father's will. The widow, Bai Samarth, contested it. The Court of the Subordinate Judge partly decided against her. On appeal to the District Court her appeal was dismissed entirely and the decree of the Lower Court in her favour was also modified against her. The High Court reversed the order of the two Lower Courts. An appeal to the Privy Council was then preferred.

De Gruyther K. C. and Parikh for the appellant contended that the gift to the sons by the Will of the father was good and the appellant was entitled to the share which on division was given to the deceased brother. The testator clearly intended that his property should remain in his own family and should not pass into another family.

Lowndes for the respondent contended that the property left by Parvatishankar was joint-family property over which he had no power of disposal by will. On the construction of the will the deceased son took an absolute interest in the moiety of the property. The clause in question was meant to apply to the case if one of the sons died before the death of the father. If the devolution was intended to be controlled after the distribution of the property, it was bad in law inasmuch as it was an attempt to prescribe a special method of devolution in the case of property which was subject to an absolute gift. The 9th clause of the Will was never intended to apply to moveables. The appellant had waived his right, if he had any, by allowing his deceased brother to deal with the property as his own. Under S. 42 of the Specific Relief Act the appellant was not entitled to sue for a declaration without also suing for the property.

Reference was made to *Mussammat Durga Choudhrain* v. *Jawahir Singh Choudhri* [1], *Norendra Nath* v. *Kamala Basini* [2], *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* [3], *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* [4], *Lallubhai Bapubhai and others* v. *Mankuvarbai and others* [5] and Indian Succession Act Ss. 111, 178 and Hindu Wills Act 1870.

De Gruyther in reply.

The Judgment of their Lordships was delivered by

Lord Shaw.—This is an Appeal from a Decree of the High

1. (1890) L. R. 17 I. A. 122.
2. (1896) L. R. 23 I. A. 26.
3. (1857) 6 Moore's I. A. 526.
4. (1862) 9 Moore's I. A. 123, 125.
5. (1876) I. L. R. 2 Bom. 388 at 428.

Court of Judicature at Bombay, dated the 20th July 1910, reversing a Decree of the Court of the District Judge, Surat, dated the 27th August 1908, which had affirmed with modifications a Decree of the Court of the First Class Subordinate Judge, Surat dated the 4th February 1907.

The only question for determination in the Appeal relates to the construction of a Will dated the 20th August 1899, made by a Hindu named Parvatishankar Durgashankar. He was a resident of Surat in the Bombay Presidency : and it may be at once stated that it was admitted by both parties at their Lordships' Bar that the Hindu Wills Act, Chapter 21, of the year 1870, did not apply to this case, which falls to be determined not by the law operative within the territories subject to the Lieutenant-Governor of Bengal or the local limits of the ordinary original civil jurisdiction of the High Courts at Madras and Bombay. It may well be that the sections of that Act upon interpretation would yield the same result as has been arrived at in the present case. But no decision on that topic is given: and the case is treated as one applying in the mofussil, and therefore to be dealt with on ordinary legal principles. It must also be stated that the various terms employed in the particular will are special, and that no general rule can be said to be previously applicable in its construction except that the Court must make its best endeavour to extract the intention of the testator.

Parvatishankar, the testator, died on the 4th July 1901. He left surviving him two sons, Shamphuprasad (who died on the 2nd January 1903, leaving a widow, the Respondent in this Appeal, and a daughter) and Chunilal, the Appellant. A third son of Parvatishankar, Surajlal had predeceased his father, but had left one son'. Surajlal had separated from his father many years previous to his death; the other sons were in family with him.

The Will was executed about two years before the testator's death and it purports to dispose of the whole of his property. By clause 2 he appointed his two sons executors, heirs and owners of the whole. In various other clauses details as to the immoveable property are given, and directions that his sons are to divide and take in equal shares the whole of it with certain exceptions. In clause 7 there is a declaration as follows:—

"As to the moveable property which I possessed, I have during my lifetime "divided the same between my two sons, Shambhuprasad and Chunilal, according "to my wishes and have made over the same in their possession"

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A certain enumeration with directions is also given as to gold and silver ornaments in his possession. By clause 8 the testator gives each of his said two sons a half of his estate not specifically disposed of by his Will.

It is clear up to this point in the Will that the one predominant desire of the testator was that his two sons should have his property between them.

It was in the course of the case, however, found in fact that he had not accomplished, or completely accomplished, this desire. And the Will accordingly falls to be appealed to as the governing instrument in regard to the distribution.

The question of survivorship as between these two sons was not dealt with until Clause 9 of the Will was reached, and it is in the following terms:—

"I have divided between and given to my two sons Shambhuprasad and "Chunilal the whole of my property as mentioned above. But should either of "these two sons die without having had (leaving) any male issue, the survivor of "the said two sons is duly to take the whole of the property appertaining to the "share of the deceased son who may have (leave) no male issue (behind him) after "undertaking (to defray) the expenses in connection with the maintenance of his "widow and the maintenance and marriage of his minor daughters. But under "these circumstances the heirs of my deceased son Surajlal shall not get any right "whatever."

Various issues were raised in the case, including whether the estate in question was self-acquired. This was answered in the affirmative, and that answer is not now disputed. As stated, the one question remaining in the case has reference to the construction of Clause 9 above quoted. The learned Judges of the High Court of Bombay have held that—

"The period of distribution contemplated by the testator is clearly the period "of his death, and under these circumstances the event which may interfere with "that distribution and give rise to the necessity for other arrangements must be "an event occurring prior to his death."

As already mentioned, Shambhuprasad survived the testator. And the result of the judgment is that one-half of the property now to be disposed of is held to have vested in him *a morte testatoris* and that the whole provision of Clause 9, with reference to survivorship falls, in the events which have occurred, to the ground. The effect of the learned Judges' Decree is that the clause must be read as if the survivorship there provided for was limited to survivorship as at the testator's death.

Their Lordships are clearly of opinion that this judgment cannot be maintained. There is nothing specifically either

English or Indian in the idea that the Will of a testator must be construed on that principle which would enable Courts of Law most fully to give effect to the intention expressed by his words. It may be that if the words he employs are *voces signatae* they must be so accepted, whatever the suspicion may be as to the testator having had that particular view of his own language. But in ordinary circumstances ordinary words must bear their ordinary construction, and the whole Will, that is, the whole of the words employed by the testator, must be looked at together so as to determine his whole intention. Furthermore, it is not on this principle legitimate to take words which have a general meaning and subject them to limitations which the words do not necessarily imply. It may be true that there is a body of older cases which would warrant a suggestion that the term employed in this Will, namely, " should either of these two sons die without having had (leaving) any male issue" should be limited to such death occurring before the death of the testator himself, but the Will does not say that, and it has for many years been a settled principle that words of this class, being in general terms, must receive their full, and not a restricted, meaning.

The leading authority on the subject is, of course, *O'Mahoney* v. *Burdett* [1] and two sentences of *Lord Hatherley's* opinion may be here repeated. He refers to the duty of the Courts always to consider carefully the whole Will,

" and, having regard to all the various clauses contained in it, to see what is the " full and complete and perfect intention of the testator."

He corrects the case of *Edwards* v. *Edwards* [2] and makes the statement of the principle run thus

" that the period to which the executory devise will be referred will be the " period of the death of the first taker, unless there are other circumstances and " directions in the Will which are inconsistent with that supposition."

If it did not appear presumptuous to say so, one might comment on the case of *O'Mahoney* v. *Burdett* as one which emerged through a thicket of technical decisions to a ground of plain and pre-eminent good sense. It was also, of course, fortified by authority, and notably by the case of *Allen* v. *Farthing*, the fullest report of which was given by Mr. Jarman in his work on " Wills." (6th Ed., p. 2160).

But so far from the language employed in the present Will leaving any serious ambiguity as to the intention of the testator,

1. (1874) 7 H. L. 388. 2 (1852) 51 E. R. 576 S. C. 15 Beav. 357.

Chunilal Parvati-shankar v. Bai Samarth.

their Lordships are of the opposite opinion. In their view the words clearly point to survivorship whenever it should occur. When Shambhuprasad, having, with his brother Chunilal, survived his father, died, leaving a widow and a daughter, the language employed to cover such a situation seems exact and clear.

"Should either of these two sons," it says, "die without having had "(leaving) any male issue, the survivor is duly to take the whole of the "property appertaining to the share of the deceased son who may have (leave) no "male issue."

And, as if this were not sufficient, the Will proceeds to lay upon the surviving brother a duty in the event of that survivorship in the following language:

"after undertaking (to defray) the expenses in connection with the maintenance "of his widow and the maintenance and marriage of his minor daughters."

It seems to their Lordships that it would be a strained construction of a Will in that form (which manifestly contemplates death occurring at any time—with the receipt of property by way of survivorship—on the one hand, and the duties to be laid upon the survivor at any time, on the other hand) to say that the whole of these provisions fall to the ground, although Shambhuprsad had in point of fact left no male issue, because he did not die in that situation before the testator himself. The testator, in their Lordships' opinion, had clearly in view a much wider and more general provision, and they think that the events which have in fact occurred, *viz.*, the survival of the testator by his two sons and the death of one of these sons leaving a widow and daughters but no male issue, are events to which the will has operative application. They accordingly do not doubt that Chunilal, the surviving son, is, as such survivor, entitled to the estate conveyed by this clause, and that the correlative obligation resting upon him comes into play.

Their Lordships desire to put on record an admission made by Counsel for the Appellant to the effect that he had no knowlege of any property of the deceased testator in possession of the Respondent, Shambhuprasad's widow, and that, if the Respondent came into possession of such property under arrangements made in the lifetime of her husband with his brother the Appellant, the present Judgment would not be used to disturb such an arrangement.

Their Lordships do not feel themselves able to give effect to the argument presented under S. 42 of the Specific Relief

Act or to interfere with the judgment of the District Judge on this question of procedure.

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Their Lordships will humbly advise His Majesty that the Appeal should be allowed, and that the cause be remitted to the High Court in order that upon provision being made and security being given to its satisfaction for the maintenance of the Respondent and for the maintenance and marriage expenses of the minor daughter a declaration and injunction be given in terms of the Plaint. In view of the special difficulties in the construction of the will the appellant will pay to the respondent all costs incurred by her before this Board and in the Courts below.

Solicitor for appellant :—*Edward Dalgado.*

Solicitors for respondents :—*T. L. Wilson and Co.*

PRIVY COUNCIL.

Present :—Lords Moulton and Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

[On appeal from the High Court at Calcutta.]

Sreemutty Ranimoni Dasi and another *Appellants*

v.

Radhaprasad Mullick and others *Respondents.*

Sreemutty Ranimoni Dasi v. Radhaprasad Mullick.

Hindu Law—Will Gift to daughters and in certain event to their sons—construction—Survivorship—interest of survivor—Costs.

A Hindu testator having by his will directed the executors "to make over and divide the whole of my estate unto and between my daughter in equal shares to whom and their respective sons, I give devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, then and in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons share and share, alike." On the decease of one of the daughters her sons claimed half the estate under the Will:

Held that on the death of the younger daughter leaving male issue the estate did not pass over for life to the elder daughter but to the sons of the deceased daughter who were living at the time the testator died. Their Lordships stated that the order was not to prejudice the rights of the grandchild of the testator adopted after the testator's death.

Their Lordships directed that the costs of the parties as between solicitor and client should come out of the estate.

Appeal from a Judgment and Decree of the High Court dated August 1, 1910 reversing the order of the High Court in its Ordinary Original Jurisdiction dated March 4, 1910.

Sreemutty Banimoni Dasi v. Radhaprasad Mullick.

The will and all other material facts will be found fully set out in I. L. R. 33 Cal. 947; 35 Cal. 886 and 38 Cal. 188.

Sir Robert Finlay K. C. and Brown for the appellants contended that the moiety of the estate enjoyed by Permoni Dasi for the life had passed by survivorship to the first appellant and that the court below was wrong in holding that no grandson of the testator born after the death of the testator could take under the will.

Reference was made to Mayne's Hindu Law, para. 559, p. 762.

De Gruyther K. C. and Dunne appeared for the respondents but were not called on.

Ross K. C. and O' Gorman watched the proceedings on behalf of Peary Lall and Behary Lall Mullick.

The judgment of their Lordships was delivered by

Lord Moulton:—Their Lordships have had an opportunity of considering the judgment of the Court below on the question as to whether on the death of the younger daughter leaving male issue the estate passed over for life to the elder daughter, and they are of opinion that it is correct, and is based on correct reasons. They will therefore humbly advise His Majesty to dismiss this appeal.

With regard to the contention of the appellants that the Court was wrong in holding that no grandchildren of the testator born, or adopted, after the death of the testator on 30th October 1875 could take under his will, their Lordships will not advise His Majesty to make any order except that the present advice is not to prejudice the position of the second appellant if and when such question comes before a Court for decision.

The costs of all parties as between solicitor and client will come out of the estate.

Solicitors for appellant: *T.L. Wilson and Co.*

Solicitors for respondent:—*Watkins* and *Hunter.*

Gush, Phillips, Walters and *Williams.*

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Appeal to Privy Council—*Criminal Case—Embezzlement—Civil and Criminal responsibility—Distinction between—Inability to produce money—Not proof of fraudulent intent—Guilty mind—Necessity for conviction—Practice—Costs directed to be paid by Crown.*

By a power of attorney executed by the guardian of certain minors the appellant was given ample power to act in the collection and investment, either with or without security, of the properties of the minors. Acting under the power certain funds were received and remittances of money were from time to time made by Messrs. Lanier & Co., the firm of which the appellant was a partner. No objection was at any time taken to this course by the guardian or the minors. On the other hand the guardian's sole anxiety was that a high rate of interest should be obtained and this was done. The firm's interposition was highly in the interests of the minors.

In November 1910 a sum of money became payable from one C. Payment was made of this sum by crediting the amount to the appellant's firm in their account with C's banker, which had been overdrawn. No concealment of any kind was practised. The amount was credited to the minor's account and advances were made as usual. On 20th June 1911, the appellant

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was called upon to give proper security for the amount remaining to the credit of the minors and time was given for the purpose. Within that time appellant gave security. Nevertheless criminal proceedings were instituted against him for embezzlement and he was convicted. The ground on which he was convicted was that though he did not wish to prejudice the minors, "it was his duty to take such precautions and to have exercised such foresight as would not have involved him in the possibility of causing prejudice to the minors" and that "the wilful and fraudulent intent resulted from the fact that the accused so used the moneys that he was unable to produce them, when called upon."

Held: That the judgment appealed against had not kept the distinction between civil and criminal responsibility sufficiently in view, that the facts did not on any just or legal view warrant a conviction for embezzlement and that the appeal came within the rule in *Dillet's Case* (1887) 12 A. C. 467.

Looking to the exceptional nature of the case, their Lordships directed the Crown to pay the appellant's costs of the appeal.

Mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as while preserving the amplest civil responsibility, to prevent the third or Criminal category from being extended to mistaken though convenient acts.

Apart from constructive criminal responsibility which may be imposed by statute a court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind.

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The power of the High Court under Charter Act S. 15 to interfere with orders passed under S. 145 Cr. P. C. is not confined to cases where a question of jurisdiction is involved but it will exercise it only when there has been a gross miscarriage of Justice.

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————Possession of a person to whom the Sub-Magistrate passing orders under S. 144 gave possession of a mutt by consent of both sides, cannot be considered to be on behalf of the person having title

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Where pending an application for execution by attachment and sale of immoveable properties, the Court ceased to have jurisdiction over those properties.

Held—that having regard to Ss. 37 and 150 C. P. C., the Court which acquired jurisdiction over the properties could continue the execution proceedings without a formal order of transfer from the Court which passed the decree.

On principle, unless the authority which changes the venue, reserves the right to the Court which has lost jurisdiction to continue pending proceedings affecting the property transferred to another jurisdiction such proceedings are also *ipso facto* transferred by the change of venue to the new court, the records relating to that action becoming part of the records of the new Court.

S. 150 C. P. C. is not confined to cases where there has been a formal order of transfer under special provisions of the Civil Procedure Code. The section adopts the Calcutta view which held that by changes of venue made by the local government the business of a Court which loses jurisdiction over a certain area so far as it relates to cases affecting the lands in the transferred area will *ipso facto* be transferred.

In the circumstances their Lordships were prepared if necessary to adopt the course taken in *Alagappa Mudaliar v. Thiagaraja Mudaliar* (1910 M. W. N. 477) by making an order of transfer from the Court which passed the decree.

An order in execution between parties to a suit passed *exparte* after affixture of notice which the Court considered sufficient service operates as *res judicata* in subsequent stages of the execution proceeding unless set aside by appropriate proceedings.

O. 9. R. 13 as well as art. 164 Limitation Act applies to such orders as they are decrees within the meaning of the Civil Procedure Code.

In this case, their Lordsdips declined to treat the objection petition by the judgment debtor as an application under O. 9, R. 13 for the reason that it did not bear a stamp, that it did not contain a prayer to set aside the order and also that it did not state when he had notice of the order.

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of making, unless order states to the contrary—Invalidity of sale—Substantial injury not necessary to set aside.

A sale of property was commenced on the 17th and concluded on the 21st July 1911. On the 20th the High Court passed an order directing an *ad interim* stay of sale. This was communicated. The telegram from the vakil who appeared for the petitioner in the High Court intimating the order was produced before the Court and the Court was asked to stay the sale. In the absence of official confirmation, the court declined to act on the telegram and directed the sale to proceed. The official communication was received only after the sale was concluded.

Held that the sale was invalid.

Further, that in order to set aside a sale held under the circumstances it was not necessary to allege and prove substantial injury.

Per Sadasina Aiyar, J—Unless the order of stay or injunction passed by the superior Court makes it a condition that the order shall take effect only from the date of its communication such order suspends the power and jurisdiction of the lower Court to conduct further proceedings from the moment the order of the superior Court is passed

Satinath Satidar v. *Ratanmani Nashar* (15 C.L.J. 835) *Hemchandrakar* v. *Mathur Santal* (16 C. W. N. 1081) *followed* ; *Muthukumarasami Rowther* v. *Kuppusami Aiyengar* (38 M. 74) *Bissesswari Chowdhrany* v. *Hurrosunder* (1 C. W. N. 226) dissented from.

Ramnatha Chetty v *Arunachellam Chetty* (Sadasiva Aiyar and Spencer JJ.) 275

———**S. 47 (O. C. S. 244)**, Compromise by father not binding on son—satisfaction entered—Remedy of son—Conversion of plaint into application 430

———**S. 63**—*Attachment by different Courts—Amount realised by the Court of the highest grade—All entitled to share rateably, though no transfer.*

Where property is attached by different Courts and money is realised in accordance with S. 63 C P.C. by the Court of the highest grade the attaching creditors are entitled to share rateably irrespective of the fact that their decrees have not been transferred to that Court.

Narasimhachariar v. *Krishnamachariar* (Wallis and Bakewell JJ.) 406

———**S. 73**—*Order 21, R. 52—Fund in Court attached by several decree-holders—Not rateable distribution, but payment in order of attachment—Attachment of money after decree for sale before payment of money into Court—Invalid.*

S. 73 C. P. C. has no application to a case where a fund in Court is attached by several decree-holders. They have not to share rateably as under the section but are entitled to be paid in the order of their attachments.

An attachment under O. 21, R. 52 after a decree for sale but before any money is realised and paid into Court is invalid and confers no right on the attaching creditor.

K. Tiruvengadial v. *K, Tiruvengadaiah* (Wallis J.) 364

———**S 92**—*Suit under—Alienee from trustee—Declaration against—If claimable—O. 22 R. 4—Appeal by alienee—Death of trustee pending appeal—Abatement—"Right to sue"—Meaning of—Limitation Act, S.10—Assignee for consideration—Limitation in favour of, though not in good faith or without notice—Effect of good faith and no notice,*

C. P. C Act V of 1908—(*Contd.*) PAGE.

Where in a suit brought by the Collector under S. 92 C. P. C against the trustee as well as an alienee from him praying *inter alia* for a declaration that the alienation in favour of the latter was not binding against the trust, a declaration having been made to that effect, the alienee appealed making the trustee as well as the Collector parties but pending appeal, the trustee died and his legal representatives were not brought on record.

Held that as the trustee was not a necessary party to the appeal, the appeal as against the collector did not abate.

Held further that the cause of action against the alienee (who was an alienee for consideration) arose on the date of the alienation and more than six years having elapsed from that date, the suit was barred by limitation under Art. 120, of the Limitation Act. Limitation will run in favour of alienees for consideration though they may not be alienees in good faith or without notice. Trust property in the hands of alienees for consideration in good faith and without notice cannot be followed at all.

Per *Tyabji J*: The words "right to sue" when applied to appeals mean right to obtain relief."

Quaere Whether alienee of or trespassers on trust property can be joined in a suit under S 92 C. P. C.

Prasanna Venkatachala Reddiar v. *Srirangammal* (Tyabji and Spencer JJ) 537

—— —**S. 109**—*Final order—Order remanding on question as to pleadings or as to bar by S. 43 C. P C. (old code)—Interlocutory judgment— No appeal to His Majesty in Council.*

An order of the High Court, remanding a suit to the District Court for trial on the ground that the District Court was wrong in holding that the pleadings were insufficient or that S. 43 C. P. C. (old code) barred the suit is not a final order and therefore no appeal lies against such order to His Majesty in Council under S 109 C P. C (new code).

Venkata Ranga Row v. *Venkataramа Narasimha Row* (Miller and Sadasiva Aiyar JJ.) 98

——— —**S. 115**—*Applicability of, to Presidency Small Causes Courts—Presidency Small Causes Courts Act S. 41 —Condition of jurisdiction to be strictly complied with—Erroneous finding, that lease has been determined —Ejectment order on that footing—Interference with—Remedy under S. 38. if open—Not bar, when question of jurisdiction—Discretion in cases coming under S. 115 cl. (c)—Want of jurisdiction—Interference compulsory—Lease for 18 years & 6 month's notice thereafter—Notice before 15 years—Ineffective*

The Presidency Small Causes Court being a Court subordinate to the High Court the High Court can interfere under Sec. 115, C P. C with an order passed under S 41 of the Presidency Small Cause Courts Act.

The jurisdiction conferred by Sec 41 of the Presidency Small Causes Courts Act being a limited jurisdiction the conditions imposed by the section should be strictly complied with.

Held accordingly where the Small Causes Court erroneously held that a lease had been validly terminated and passed an order in ejectment, that the order was without jurisdiction and could be set aside under S. 115 C.P.C.

The question of the High Court refusing to interfere in discretion on the ground that the party has another remedy, will generally arise only in cases coming within cl. (c) of S. 115.

C. P. C. Act V of 1908—(*Contd.*) **PAGE.**

Where want of jurisdiction is established, no question of discretion arises and the court is bound to interfere apart from any question as to whether the party has other remedies open to him.

Quaere if S. 38 of the Presidency Small Causes Courts Act applies to proceedings under S. 41 *Ramakrishna* v. *Haji Dawood* (31 B. 259) referred to.

A lease for 15 years, with a provision for 6 months notice thereafter before the lessee could be asked to vacate is not determinable by a notice given before the expiry of the 15 years.

Ramasami Naidu v. *Venkataramanjulu Naidu* (Seshagiri Aiyar J.) 467

———**S. 115 O. 9. R. 13 O. 5 Rr. 17. 19**, service by affixture, when proper —Interference in revision,—Charter Act, S. 15 368

———**S. 141**, extends provisions of O R. 6, 17 to pauper applications... 348

———**O. 9, R. 13—O 5, Rr. 17, 19**—*Service by affixture—Process server not stating date of defendant's return, indefinite—Inference from circumstances—Admissible—C. P. C., S. 115 —No interference under—Charter Act S. 15—In gross case, High Court interferes.*

When the process server went to serve the defendant (a resident of Bezwada), his gumasta said that he had gone to Tirupathi and so the summons was affixed on the outer-door of his house. The Munsif examined the process server and declared the service sufficient. It was contended that as the process server did not say that the date of the defendant's return was not known or was indefinite

Held: the service was insufficient overruling the contention that it was open to the court to make the inference from the circumstances and to declare the service proper.

Held further that, two courts having agreed in holding that the service was proper and refused to set aside the *exparte* decree, the High Court could not interfere with the order in revision under S. 115 the error if at all being only an error of law.

Semble: In a case of patent and extreme hardship the High court might interfere under the Charter Act.

Pitchayya v. *Mahomed Abdul Kareem* (Sadasiva Aiyar J.) 368

———**O. 18, r 18.** *Rules of Practice—Sanction of the District Judge—Local investigation by District Munsiff—Sanction necessary for levy of expenses*

A Munsiff is not bound to obtain the sanction of the District judge before he makes a local investigation. Order 18 r. 18 leaves the matter absolutely in his discretion.

Sanction is however required under the rules for the levy of money for expense..

Bodi Naidu v. *Chengama Naidu* ... 9

———**O. 21, r. 57**—*Attachment before Judgment not affected by when no application for sale in pursuance of the same—Application for rateable distribution, effect of.*

Order 21, Rule 57 makes an attachment cease on the dismissal of an execution application only if the attachment had been made in execution of the decree and not when the attachment is one made before judgment and there has been no application for sale in pursuance of the same.

An application for rateable distribution of the proceeds of the sale of the properties attached in execution of another decree has not the effect of converting the attachment before judgment into an attachment in execution.

Banuddin Sahib v. *Arunachala Mudali* 215

C. P. C Act V of 1908—(*Contd.*) PAGE.

O. 21—Rr. 58, 63. (O. C. Ss. 278 and 283)—*Joint order on two claim petitions—Construction—Attachment raised—Effect of an order on claim petition.*

Where a claim petition by the plaintiffs objecting to attachment on the ground that the property attached had been purchased by them prior to such attachment and a petition by another party who claimed the property by survivorship were heard together and a single order was passed raising the attachment, the ground given being that the property was joint family property which passed by survivorship and was therefore incapable of attachment for the debt of the deceased judgment-debtor, so far as the plaintiffs' petition went, however, the opinion of the court being against the *bona fides* of their sale.

Held that the order could not be construed as one made against the plaintiff and even so, the attachment having been raised, plaintiffs were not bound to set aside the order.

Koyyana Chittena. Doosy Gavaramma (29 M. 225) distinguished

Effect of raising attachment, withdrawal of execution petition & etc on oders on claim petitions considered.

Ponako Balarami Reddi v. *Hasi Mahomed Abdul.* (Tyabji and Spencer JJ.) 499

————**O. 21. 63 R.** Suit, under—Continuation of the claim proceeding Lis Penden ... 44

————**O. 23, r. 3**—*Compromise—Hindu Law—Religious office—Right of succession to—Archaka—Right of females to inherit or hold office—Permanent disqualification to perform office—Disqualification to hold office and enjoy emoluments—Trusteeship and Archakaship, defendant petitioner—Alienation, for consideration—Custom—Illegality of—Judgment by consent in respect of religious office—Not binding against public—Undue influence—Low price, not ground for finding—Intention of founder—Criterion for determining.*

Where under a compromise, the defendant who had obtained a decree in his favour agreed for a pecuniary consideration to part with a portion of his right to the Archaka miras in a temple in favour of the plaintiffs (females) *Held* that the compromise being opposed to public policy could not be given effect to under O. 23, R. 3 C. P. C.

Per *Sadasiva Aiyar, J*:—The alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld even if custom sanctions it, such custom being opposed to public policy.

Permanent disqualification to perform the duties of an office is also a disqualification to hold the office and enjoy its emoluments whether the disqualification is by reason of change of faith, disease, or of sex.

Females being by reason of their sex disqualified from performing the duties of the Archaka office in a saivite temple, are also disqualified from inheriting the Office and enjoying its emoluments

In the case of religious offices, duties form the substance, rights being only appurtenant to the duties.

In the case of trusteeship, which does not involve duties which females are incapacitated from performing, sex may not be a disqualification to inherit the office.

Mallikarjuna v. *Sridevamma* (20 M. 162 S. C. 7 M. L. J. 289) *D uncoover Bai* v. *The Advocate General* (1 Bom L R 743) *Radhamohun Mundal* v. *Jadoomani Dasi* (23 W. R. 399) referred to.

C. P. C. Act V of 1908—(*Contd.*) **PAGE.**

The proper performance of duties attached to a religious office being a matter which affects the public, judgment by consent with respect to the right to hold such office will not bind the public.

The fact that a man is obliged to part with his property for what he considers an unduly low price owing to pressing necessities is not a ground for holding that the contract is vitiated by undue influence.

Per Tyabji, J:—The question whether sex is a disqualification to inherit must be decided with reference to the particular facts of each case, the nature of the functions to be performed by the office-holder, the amount of remuneration, whether it leaves a surplus, or not, and other similar matters.

In determining the rule of succession to a religious office, the first matter to which attention is to be directed is in what method did the founder of the institution desire that succession to the office should devolve. The desires of the founder must be given effect to unless they are opposed to public policy or to the fulfilment of the general objects of the institution.

In the absence of a written instrument containing a record of the founder's intentions, the course of practice in the past furnishes the rule as giving indications of the same and may be supplemented by general law and also by a consideration of the customs and usages prevailing in similar institutions in the same locality.

Sundarambal Ammal v. *Yogavanagurukgal* (Sadasiva Aiyar and Tyabji J) 315

————**O. 23, R 3 (O. C. S. 375)**—*"relates to subject matter of the suit"—Terms forming part of consideration—Objection that terms do not relate to subject matter of the suit—Not open in execution—Contract Act, S. 54—Reciprocal promises—Non-performance by A wrongfully, by B rightfully because of A's non-performance—Contract at an end—Terms in favour of B. not enforceable—Claim only for compensation—Offer—Essentials of—Readiness to release without executing release deed, insufficient—Offer to release if payment made within one week conditional—Continuing offer—Opportunity to test offer—Necessity for.*

In a suit upon a simple bond for Rs. 10,000 executed in favour of the plaintiff by the 1st defendant and the deceased father of defendants 2 and 3, the parties compromised all their disputes including that about the suit bond and agreed that on plaintiff depositing Rs. 13,000 which he had to pay under a sale in his favour by the 1st defendant, within a certain time, defendants should get released those properties and certain other properties which had fallen to his share from the claim under a mortgage decree and that on defendants fulfilling the conditions imposed on them, the claim of the plaintiff on the suit bond should be set off against the claims of the defendants and plaintiff should pay Rs. 2,200 to the defendants and a decree was passed in terms of the compromise so far as those terms related to the subject matter of the suit.' Plaintiff failing to make the deposit, defendants applied in execution for the payment of Rs. 2,200 according to the compromise. Plaintiff resisted the application on various grounds. He contended that as the term as to Rs 2,200 did not relate to the subject matter of the suit, no decree could be taken to have been passed in respect of it, and that the decree if one had been passed in respect of it, was *ultra vires*. He also contended that the defendants having precluded themselves from performing their

C. P C. (Act V. of 1908)—*contd.* PAGE

part of the contract by the conduct of the 3rd defendant taking an assignment of the mortgage decree and purchasing the properties himself, could not enforce the payment.

Held : that as the settlement of all the disputes and the payment of the amount was a part of the consideration for the compromise, the compromise was validly made into a decree and that even if it were otherwise, objection to the validity of the decree on that ground could not be taken in execution.

But *held* though, in the first instance, plaintiff had committed default by not making the deposit, defendants not having performed their part of the contract, nor made a continuing unconditional offer to comply with the terms of the contract giving a reasonable opportunity to the plaintiff to see if the thing offered was the thing he was entitled to get but having by the conduct of the 3rd defendant precluded themselves from performing their part of the contract they could not enforce the clause for payment in their favour.

If both parties to a contract, A and B fail to perform their reciprocal promises, A wilfully, and B because he was not bound to fulfil his part unless A fulfils his part of the contract, the contract itself comes to an end by act of parties, and B can no onger claim performance of the specific obligation undertaken by A under the contract his only right being to claim compensation.

Held : An offer that the 3rd defendant was ready to release the properties from the mortgage decree if the plaintiff paid Rs. 13,000 within a week was not an uncon ditional offer and could not have the same effect as performance.

Held also : A mere offer by posted letter, that the 3rd defendant was ready to execute a release without having a document of release ready, was not a proper offer uender S. 33 of the Contract Act.

Sabapathy Pilli v. *Vannahalinga Pillai* (Ayling and Sadasiva Aiyar JJ.) 331

——— **O 33, R 2, 3, 5**—*Pauper application—joining unsustainable claims with good ones—No ground for rejecting—Misjoinder, mistake of law or fact, not within O. 33 R. 2—Power to direct amendment Inherent power—S. 141 —Extension of O. 6. R. 17 by.*

Order 33, R. 5 does not allow the rejection of an application for leave to sue in forma pauperis on the ground that patently unsustainable claims have been joined in the application with claims that are sustainable

It is only where the allegations do not disclose any cause of action as regards any of the reliefs that the application could be rejected

Order 33 r. 5 refers only to rules 2 & 3. O. 33, R. 2 does not deal with mistakes of law or fact or mistakes such as non-joinder or mis-joinder found in the plaint.

Suit by a concubine and her son for maintenance against the members of the family of her paramour is not open to the objection of misjoinder

The power to direct a pauper applicant to amend his application by deleting unsustainable claims, is one of the inherent powers of the Court and no specific provision of the Code is necessary to enable it to exercise the power.

S. 141 C. P C. extends the provisions of O. 6, R. 17 to pauper applications.

Kanagammal v. *Panchapakesa* (Sadasiva Aiyar J) 348

C. P. C (Act V of 1908)—*contd.* PAGE

————**O 34. R 5.**—order absolute not passed—objection when not available. 255

————**O 34. R 6**—*No right to proceed under, without bringing mortgaged property to sale—May proceed against judgment-debtor selling property in part satisfaction.*

A mortgagee decree-holder cannot proceed against the judgment-debtors personally under O. 34, R 6 before bringing the mortgaged property to sale. But where after the decree one of the judgment-debtors had sold the property to the decree holder in part satisfaction of the decree *Held* that he could proceed against the judgment-debtor who had so sold the property to him for the balance after giving credit for the purchase money though he could not as against the other judgment debtor who had not consented to the sale

Sreenivasa Ayyangar v. *Oundaswamy Naiker* (Sankaran Nair and Ayling JJ) 375

————**O. 41, R. 27**—Admission of new evidence be appellate Court to discredit witness 153

————**Order 43 r. 1 (r)—Order 39 r. 2**—*Order refusing commitment—Appeal against—Maintainability of—Attachment and commitment—Powers of—May be alternatively exercised.*

An order refusing to attach the property of a person who has disobeyed an injunction or to commit him to prison is an order under Or. 39 R 2 and an appeal lies against such order under Order 43 R. 1 (r).

The powers of attachment and commitment conferred by O. 39 R. 2 can be exercised alternatively and the Court is not bound to attach the property before ordering commitment.

Quaere, if the powers can be exercised cumulatively.

Thayath Suppi v. *Masaber Koya* (Miller JJ) ... 87

————**O. 45, Rr. 15 and 13**—Privy Council decree—first courts 185

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———— **S. 54**—Reciprocal promises non-performance by A wrongfully, by B rightfully because of former's non-performance—Contract at an end... 881

———— **S. 69**—" *Interested* "—" *Bound by law to pay* "—*Mortgage—Sale of part free of encumbrance—Sale of remainder—Purchase money left with vendee to discharge mortgage—Failure of vendee to discharge*

Contract Act—*contd.* PAGE

—*Payment by first vendee—Rights of—Right in equity to stand in the shoes of vendor—Contribution—No right against person of second vendee*

Plaintiff's father purchased a portion of certain property under mortgage under circumstances showing that it was to be free of the mortgage On the next day 2nd defendant purchased the remaining portion, part of the purchase money was left with him to discharge the mortgage. 2nd defendant having failed to discharge the mortgage, the mortgagee brought a suit and though the plaintiff's father was personally exonerated, a decree was passed ordering the sale of the whole of the mortgaged property. When the properties were accordingly put up for sale, plaintiff paid off the decree and brought the present suit to recover the amount. The Munsiff passed a decree against the 2nd defendant. On appeal the District Judge held that there being no privity of contract between plaint iff and the 2nd defendant plaintiff was not entitled to recover, the whole of the amount paid but was entitled only to contribution and remanded the suit.

Held on appeal, that the plaintiff was entitled to recover the entire amount though not personally but only from the property in the hands of the 2nd defendant.

Held per *Miller* J. That he was entitled to recover under S. 69 of the Contract Act.

Per *Sadasiva Aiyar J.* That he was entitled to recover under that section or under S, 70.

That he was also entitled in equity to stand in the shoes of the mortgagor and to recover compensation for the defendant's failure to perform his obligation to discharge the mortgage.

The words "interest" and "bound by law to pay" in S, 69, considered.

Per *Sadasiva Aiyar J* As the judgment of the lower court was not on a preliminary point, the order of the Judgment remanding the suit was in any event wrong.

Muthurakku Maniagaran v. *Rakkappa* (Miller and Sadasiva Aiyar JJ) 66

Co-owners—Transfer of tenants interest to one co-owner—suit by the other against the tenant—Transfer before suit—Maintainability 435

Counsel—Cross- examination—Duty of—Jurisdiction of Court to pronounce on the matter 549

Court Fees Act—S. 19 H. Cl. 4, Subs. 84 56

———**S.7, Cl. 9**—Valuation of a suit falling within—Same as for purposes of jurisdiction as for Court fees 573

Criminal Procedure Code—*Bail bond—Sureties—Suicide by accused—Forfeiture of.*

A bail bond given by sureties for the appearance of an accused person is not liable to be forfeited because the accused having committed suicide they are unable to produce him.

Vijiaraghavalau Naidu In re (Benson O. C. J. and Napier J.) 63

———**S. 195 Cl. (6)**—*Sanction—Appellate Court's order confirming the grant of Six month's time to be calculated from the date of the appellate court's order—Sanction by District Magistrate—Appeal to High Court—Legality of the order confirming sanction—cannot be questioned—Cr Pr. code S. 587 Cl. (b).*

Cr. Pro. Code—*contd.* PAGE.

Confirmation by the appellate Court of sanction granted by the lower court amounts under the authorities to a fresh grant of sanction by the appellate Court and as such the six month's time allowed under S. 195 Cl. (6) for presenting the complaint ought to be calculated from the date of the appellate Court's order and not from the date of the lower court's order

Where sanction was granted by the District Magistrate and the sanction was confirmed by the High Court on appeal.

Held that though the proper appellate authority was the Sessions Judge, the High Court having confirmed the sanction, the legality of the said order could not be questioned and the six month's time should be calculated from the date of that order.

Per *Sadasiva Aiyar J*: Obiter. In view of S. 537 Cl. (*b*), the judgment in *Chinna Karuppa Goundan* v. *Muthu Goundan* requires reconsideration.

Public Presecuert v *Unnithiri* (Wallis, Sadasiva Aiyar and Spencer JJ) ... 511

———**S. 147**—*Order under S. 144—If bar-No interference by High Court unless apprehension of breach of the peace unreasonable—Public right of way within section*

An order under S. 147 Cr Pr. Code is not liable to be set aside merely on the ground that an order under S. 144 has already been made in respect of the same matter unless the Court considers that the Magistrate's apprehension of breach of the peace is altogether unreasonable in the circumstances of the case.

There is no foundation for the view that public rights of way do not come within the section.

Order to remove obstruction to public pathways can validly be passed under S. 147.

Karuppanna Goundan v. *Kandaswami Goundan* (Sadasiva Aiyar and Spencer JJ.) 233

———**S. 162**—*Copies of statements to police—No right to get copies unless Magistrate considers inexpedient to grant—Can obtain only if the Magistrate considers expedient to grant.*

Under S 162 Cr. P. Code, it is only if the Magistrate considers it expedient in the interests of justice to grant copies of statements made to the police that the accused can obtain copies of such statements. It is not correct to say that unless the Magistrate says that it is not expedient in the interests of justice to grant copies the accused is entitled to get the copies.

Thiruvengada Mudali In re (Sadasiva Aiyar J.) 182

———**Ss 179, 188**—*Former not subject to latter—Criminal breach of trust by British subject committed outside British India—Loss sustained within—Political Agent's certificate not necessary.*

S. 179 Cr. P. Code is not subject to S. 188 and therefore, an offence of criminal breach of trust committed by a British subject outside British India is triable in British India without a certificate of the Political agent if the loss consequent upon the criminal breach of trust was sustained in British India.

Per *Sadasiva Aiyar J*. None of the Sections 179 to 184 need be read subject to S. 188.

Assistant Sessions Judge of N. Arcot v. *Ramaswami Asari* (Sadasiva Aiyar and Spencer JJ.) 285

Cr. Pro. Code—(*contd.*) PAGE.

——**S. 195**—*Forged document—Prosecution in respect of, by person not party to a proceeding in which document was produced—Sanction not necessary*

No sanction is required for the prosecution of a person in respect of a forged document when he is not a party to the proceeding in which the forged document is produced.

John Mortin Sequiera v *Luja Bai* (25 M. 671) followed

Sessions Judge of Cuddapah v. *Kondeti Obalesu* (Sadasiva Aiyar J.) 220

——**Sec 195 Cl.** 6.—*Grant of sanction—Findings in case and counter case—No independent enquiry at time of granting sanction—Police reports, reliance on—Nature and exercise of the powers under clause 6 of S. 195.*

Where a Magistrate referred a complaint to the Police and on their reporting it to be false, dismissed it and without holding any further inquiry gave sanction to prosecute the complainant for making the complaint.

Held, that S. 195 Criminal Procedure Code does not require that an independent inquiry should be held on an application for sanction or that the sanction should be based only on legal evidence taken at such enquiry and as the Magistrate had before him not only the police report but also the judgment in another case tried by his predecessor in which the appellant's case had been fully investigated and found to be false, the sanction was not illegal.

Queen Empress v. *Sheik Beari* explained.

Per *Sadasiva Aiyar, J.* (*Wallis J.* concurring). A third appeal in sanction matters though permitted by law should, as a matter of practice be rejected unless something more than mere technical irregularity or illegality is made out.

It was not intended by cl. 6 of S. 195 that the appellate authority was bound to revoke the sanction whenever some irregularity or even illegality is shown in the proceedings of the authority granting sanction

The High Court should not interfere with the discretion of the Subordinate Courts in the matter of the granting of sanction unless there is some strong *prima facie* ground for holding that there is no reasonable probability of having a conviction or that the party against whom sanction is granted is innocent or that it is inexpedient to grant sanction.

A sanction granted cannot be set aside merely on the ground that the courts below have also relied upon probabilities which cannot be used at the trial unless such irregularity has caused a failure of justice.

Where it cannot be said that the Magistrate has substituted the judgment of the Police for the Judgment of the court, the mere fact that the court has referred to the Police report in granting the sanction, does not vitiate the sanction.

Quaere if the judgment in the other case would not be evidence under S. 11 cl. (2) of the Evidence Act.

Obiter. A preliminary enquiry is not essential in all cases even when the court takes action under Sec. 476.

Narayana Nadar In re. (Wallis and Sadasiva Aiyar JJ.) 486

——**Ss 195 Cl (6)** and 537 (*b*)—*Sanction by District Magistrate—Confirmed by the High Court—Whether legality can be questioned* 511

Cr. Pro Code—(*contd*). PAGE.

——— **Ss. 247, 417, 439**—*Acquittal by trick of accused—Not ground for revision—Otherwise if appeal is filed by Government—Appeal on the ground of—Discovery of fresh evidence or sufficient cause for absence of complainant—Appeal not restricted to errors on the face of record—Permissibility of, for good reason,—for error not apparent—Appeals against acquittal and conviction—No difference.*

The fact that the accused obtained his acquittal under S. 247 Cr. Pr. Code by preventing the complainant from appearing when the case was called on by wrong fully arresting and detaining him on a false charge of nuisance is not a ground for setting aside the order of acquittal in revision, whether directly at the instance of the complainant or on a report of the District Magistrate at his instance, though it may be a good ground for appeal.

Per Miller J—*Quaere*, if an order of acquittal can be set aside even on appeal merely on the ground that fresh evidence is available which could not be produced at the trial or on the ground that the complainant owing to whose absence the order of acquittal was made has shown sufficient reason for his failure to appear.

Per Spencer, J.—There is nothing in S. 412 Cr. Pr. Code to limit appeals against acquittals to cases in which Courts have owing to some error of law or misappreciation of evidence come to a wrong decision on the evidence before them. S. 228 Cr. Pr. Code allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions.

Sinnu Gownan In re (Miller and Spencer, JJ.) 160

——— **S. 417**, appeals against acquittal and conviction—no difference 160

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Custom *Alienation of religious office, Illegality* 815

——— *in Palghat—water course—ownership of beds in natural streams* 885

——— *marriage during life of first husband in the absence of dissolution—Public policy* 68

Damages—*Vakil accepting engagement for one party—Agreeing not to appear for the opposite party—Subsequent acceptance from the opposite party—Breach of Contract—Amount of damages.*

Plaintiffs 1 to 7 describing themselves as ryots of an agraharam retained defendant a pleader to appear for them in certain suits which they expected the Agraharamdar to bring against them. The defendant settled his fees and accepted a portion. He also agreed to appear for a similar fee in suits which may be bought against other ryots of the agraharam in a batch along or simultaneously with suits against themselves. Contrary to the engagement the defendant accepted an engagement from the Agraharamdar in suits filed by him against plaintiffs 8 and 9 some other ryots of the village. The defendant was also paid some money by the plaintiffs to obtain an opinion. He obtain- ed the opinion and kept it with himself.

Held that the intention was that defendant would appear for the ryots against the Agraharamdar in all suits between them; that defendant in accepting engagement from the agraharamdar in suits against plaintiffs 8 & 9 disabled himself from performing his contract and was liable in damages for breach of the contract.

amages—(*contd*). PAGE.

That he was bound also to return the amount of the fee paid for the opinion which he had obtained but failed to deliver to the plaintiffs.

Venkataramayya v *Lakshmi Narasimho Charlu* (Sankaran Nair and Bakewell JJ.) 72

Days of grace—Whether parties can contract out of—Negotiable Instruments Act, S. 22—Public policy 494

Debtor and creditor—*Composition—Arranged by some creditors—Other not agreeing—None bound.*

Where a few of the creditors, without authority from the general body of creditors, arranged with the debtors that a certain portion of the assets should be set apart for the satisfaction of all the creditors in Madras and the balance for the satisfaction of the moffussil creditors and an agreement was also drawn up in accordance with the arrangement making all the creditors parties but some of the creditors failed to agree and recovered their claims in full.

Held that under the circumstances the proper inference to make was that no creditor agreed to be bound unless all agreed and in the absence of general consent even the signatories were not bound.

Guruviah v. *Kotiah* (Bakewell J) 366

Deed—Construction—Whether words sufficient to exclude survivorship 479

Deed of gift—*Pardanashin lady—Burden of proof of execution—Independent advice—Undue influence—Rules in favour of pardanashins are protections given by law and are not to work as disability.*

Where a Hindu lady had made a gift of one-half of the properties absolutely vested in her to the son of her paramour whom she treated with affection from his very boyhood, in a suit which was subsequently brought to set aside the aforesaid deed of gift on the ground that the executant was a pardanashin lady and had no independent advice.

Held, that the deed was duly executed, that she had the proper legal capacity to execute it, that it was read over to her and explained, that no undue influence over her was proved, and that as she was a woman gifted with strength of will and business capacity and the deed in question was not under the circumstances of her life in any way an unnatural disposition of her property the deed must be held to be an expression of her deliberate mind, rendering independent advice wholly unnecessary.

Held, further that although in case of a deed of gift executed by a pardanashin lady those who relied upon the deed had to prove affirmatively and conclusively that "the deed was not only executed by, but was explained to, and was really understood by" and "was not signed under duress but arose from the free and independent will of the grantor," these provisions were a legal protection extended to her and could not be transmuted into a legal disability.

Held further that to sustain an allegation of undue influence the facts must fall under the general and useful category of the principle which in the language of Lord Kingsdown in *Smith* v. *Kay* (7 H. L. 750) "applies to every case where influence is acquired and abused, where confidence is reposed and betrayed."

Mirza Sajjad Hossain v. *Nawab Wasir Ali and others'* (34 A. 455) *and Mohammed, Bakhsh Khan* v. *Hossein Bibi* (15 C.684) *approved & distinguished.*

Kali Baksh Singh v. *Ram Gopal Singh* (P. C.) 121

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Defamation—*Defence of good faith and for the public good—S 499 I. P. C. Exception 9 and S. 52 I.P.C.—Comment on judicial proceedings —Privilege of press—Misdirection to jury—Practice of the Judicial Committee in appeals in criminal cases.*

Held that the question for the jury was whether in publishing the libels complained of, the accused acted in good faith and in the belief of their being true, after giving due care and attention to seeing that they were so.

Held that the question for the jury was whether in publishing the libels complained of, the accused acted in good faith and in the belief of their being true after giving due care and attention to seeing that they were so.

The allegations to which the libel related having been investigated by the Government (prior to the publication of the libel) and the officer whose conduct was called in question having been exonerated from blame, the accused assumed grave responsibility for reopening the matter; and it was well worthy of consideration by the jury that no fresh facts were adduced in explanation of reviving the matter and that the accused gave no assistance to the Court on the subject of what were the actual things upon which he founded his own beliefs nor what the steps were, if any, which he took to investigate their truth before giving them to the public.

Referring to certain portions of the libel which were very gross and which in their Lordships opinion, the accused could have had no reasonable ground for believing to be true, their Lordships held that in any view of the case there could have been no defence in regard to these substantial portions of the libellous matter.

The Queen v. *Newman* (1. E. & B. 558) referred to.

When, in the course of the trial, the evidence revealed that in writing the libel, the accused had proceeded on a gross mistake on an important matter of fact, the libel should not have been adhered to for a moment; the mistake should have been acknowledged and an apology, tendered.

A charge to a jury must be read as a whole If there are salient propositions of law in it these will, of course, be the subject of separate analysis. But in a protracted narrative of fact the determination of which is ultimately left to the jury, it must needs be that the view of the judge may not coincide with the views of others who look upon the whole proceedings in black type. It would however not be in accordance either with usual or good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case is being fairly left within the jury's province.

In the region of fact the Judicial Committee will not interfere unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred.

It is a timeworn fallacy that some-kind of privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so also may the ournalist, but, apart from statute law, his privilege is no other and no higher.

The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms or his comments is as wide as and no wider than, that of any other subject. No privilege attaches to his position'.

Defamation—(*contd*). PAGE

It is also a dangerous doctrine that some privilege or protection attaches to the public acts of a judge which exempts him in regard to these from free and adverse comment. He is not above criticism, his conduct and utterances may demand it.

Freedom would be seriously impaired if the judicial tribunals were outside the range of such comment.

The position and functions of the Judicial Committee in criminal cases fully discussed.

The Queen v. *Mukerji* 1 Moore N. S 272 : 15 E. R. 709, *The Falkland Islands Company* v. *The Queen* 1 Moore N. S. 299, 312, 15 E R. 718 and *Clifford* v. *King Emperor* L. R. 40 I. A. 241 referred to with approval. *Dillet's case* L. R. 12 A, C. 459, *Makin* v. *The Attorney-General for N. S. Wales* 1894 A. C. 57, *Pillai* v. *King Emperor* L. R. 40 I. A. 193=25 M. L. J. 518, *Lanier* v. *The King* 1914 A. C. 221=26 M L J. 1 explained.

The position of the Committee is different from that of a Court of Criminal Appeal. It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law, unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale there has been a violation of the natural principles of justice so demonstrably manifest as to convince their Lordships first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided.

Arnold v. *King Emperor* (*P. C.*) 621

Easement right against Government—Twenty-five years—construction of Dam—Proof of 885

Ejectment,—Inamdar, jurisdiction of Civil Courts 285

————Notice to quit—Lease for 15 years & 6 months—Notice before 15 years—Ineffective 467

————Presidency Small Causes Courts Act, Ss. 38 & 41, Erroneous finding that lease has been terminated, Want of jurisdiction—Interference under S. 115 C. P. C. 467

Estates Land Act Ss. 6 (2), 8—*Jurisdiction—Inam—Minor Inam and whole village inam—Presumption of grant of melwaram—Irrespective of purpose and grantor—Crown grant and Zamindar's grant—No difference between—S. 6, cl. (2) S. 8 and exception—"Acquired," meaning of—Surrender or abandonment—Acquisition by, if within—Original grant—Tests for determination of the nature of—Commencement of tenancy, and possession of present tenants, difference between—Grant to Brahmins—Inference, in case of.*

Whether it is a Zamindari, or a whole village inam or a minor inam situate in a Zamindari or an inam village, the presumption is the same, *viz.* that the grant is only a grant of the melwaram and it lies on the grantee to show that the grant was of both the Melwaram and the Kudivaram or that he owned the Kudivaram when the inam was granted This presumption arises irrespective of the connection in which the question arises, (*i. e.* equally when a question of civil court's jurisdiction is involved and when the suit is for ejectment of the tenants of the land) and also irrespective of the

person who is said to have originally made the grant (*viz.*, whether it is the Crown or the Zemindar.)

The rule laid down in S. 6. cl. 2 is not confined to Zamindaries and extends also to inams.

Per *Sadasiva Aiyar J, Spencer J* contra) The term "acquired" in exception to S. 8 does not include acquisition by surrender or abandonment.

Per *Spencer* J. In the absence of evidence to the contrary when after a surrender or abandonment, the inamdar grants the land to other tenants, the presumption is that he grants it again on the old terms i. e., with occupancy rights.

In the determination of the question whether an inam consists of both the warams or only of the melwaram it is not so much the commencement of the possession of the present tenants that is important as the commencement of the tenancy, where it is shown that the tenancy originated in leases containing a clause that the tenants should vacate at the end of the term, a presumption arises in favour of the inamdar being the owner of both the warams.

Where the original grant is to Brahmins, the inference is strong against its being of both the warams.

Circumstances in favour of and against the original grant being of both warams considered.

Suryanarayana v. *Potanna* (Sadasiva Aiyer and Spencer, JJ.) 99

———**S. 3 cl. 2 (d)**—*Civil Court—Jurisdiction—Estates—Waste land in Inam village—Part of Estate—Grant of waste land—Grant of both the warams if equivalent to S.8 and exception to—Surrender Not a mode of acquisition—Tenants not having occupancy right—Effect of change of tenants.*

Where in a suit for ejectment brought in a Civil Court against a tenant holding under a lease for a year after the expiry of the term, it was found that the land formed part of an Inam village that it was waste at the time of the grant and that since no occupancy right had been acquired by any tenant, the tenants in occupation being only yearly tenants from whom the plaintiff had taken a surrender before he gave the land to the defendant

Held, that the land in suit formed part of an estate and that it had not ceased to be such by reason of any acquisition by the plaintiff of the Kudivaram interest and that therefore the suit was not cognisable by the Civil Court.

Per *Sadasiva Aiyar J* :—Where the Government grants a whole village in which some lands are lying waste but most of them are under cultivation, the presumption is that the grant is only grant of the melwaram and the Inamdar has not the Kudivaram right even in the waste land. Though he could create Kudivaram interest by letting them to tenants and could have, before the Estates Land Act, converted them into private land by getting them cultivated by his own servants.

Where however all the land in the village was waste at the time of the grant or a portion of the village was granted, being waste, the grant might properly be held to include the Kudivaram also where whole village lying waste is granted in Inam, it cannot be said that the grant is a grant of the revenue also and as such no part of the village will come within the definition of estate in S. 3 cl. (2) (d).

The view of *Miller J.*—That land in an Inam ceases to be part of an estate when the tenant is shown not to have occupancy right therein dissented from.

Estates Land Act—(*Contd.*) PAGE.

Where an Inamdar gives waste land for cultivation without giving the cultivator permanent occupancy right and changes the cultivator from time to time it cannot be said that thereby he acquires Kudivaram interest when there is no evidence that he let them expressly as private land.

Abandonment or surrender is not a mode of acquisition contemplated by S. 8.

A suit for ejecting a tenant from ryoti land will lie only in the Revenue Court. *Buchi Saravagorudu* v. *Venkataraju*, 25 M. L. J. 617. *Rama Reddi* v. *Karpi Sivagu* 21 I. C. 916 followed.

Per *Seshagiri Aiyar J*:—Where the Government grants a village part of which only is waste, though in respect of the waste land the grantee becomes the owner of both the Kudivaram and Melvaram interest the village is an estate as it fulfils both the conditions required by S. 3 cl. 2 (d) viz, that the entire land revenue to which the grantor is entitled should be transferred (2) that the grantee should not have been the owner of the Kudivaram of the village as a whole.

Surrender *ipso facto* is not a mode of acquisition and as such is not included in the word "otherwise" in S. 8.

Venkata Sastrulu v. *Sitaramudu* (Sadasiva Aiyar & Seshagiri Aiyar JJ). 585

———**Ss. 3, 6.**—*Estate—Grantee from widow—Landholder—Ryot—Presumption, grant of occupancy—Waste lands—Stronger than in case of occupied lands—Based on practice of Zamindaries—Onus of rebutting.*

A tenant introduced into the land by a grantee from the widow of a landholder is a ryot within the meaning of S. 3 of the Estates. Land Act though the grant may be one which is not binding on the reversioner and is entitled to the benefit of S. 6 of the Act.

Portions of Estates which are granted away but are not held on permanent undertenures continue part of the Estate notwithstanding such grants.

Presumption as to grant of occupancy laid down in *Chekati Zamindar* v. *Ranasooru Dhora* (1899) I. L. R. 23 M. 318.being based on the practice of Zamindaries in general and not on the practice of any Zamindari in particular, it is for a person alleging that the practice in his Estate is different to adduce evidence to prove that it is, in fact, different.

The presumption in favour of the grant of occupancy is stronger in the case of waste land than in the case of occupied land.

Brindavana Chandra Hari Chandra Raja v. *Ramayya* (Tyabji and Spencer JJ.) 600

———**Ss. 4, 27**—*Payment of rent on the basis of the cultivated area—Custom not illegal.*

S. 4 of the Estates Land Act should be read subject to the provisions of S. 27 and a custom of paying rent on the basis of only the cultivated area in the holding is not illegal.

Arunachellam Chettiar v. *Muthayanai Thaven* (Ayling and Tyabji JJ)... 575

———**Ss. 6, 8, 153, 157, 163**—*Jurisdiction of Civil Courts—Ejectment—Inamdar—Tenant under time-expired lease for 3 years at the time of the passing of the Act—Occupancy right found not to be in tenant—Presumption that Inamdar has occupancy by grant or acquisition—Not "Estate"—Tenant of old waste for less term than 5 years—Liable to eviction under S. 153—Not effected by S. 157 "Admitted as ryot" in S.163—Meaning of—Tenant in possession after expiry—lease not recognised by landlord—Liability to eviction under S. 163.*

Estates Land Act—(*Contd.*) PAGE

Per *Miller, J.*—When it is found that a tenant on an Inam has occupancy right, the presumption is that it is in the Inamdar either by the original grant or by prior or subsequent acquisition, in either of which cases, the land is not an "Estate" and the tenant is liable to be evicted in Civil Courts as an ordinary lessee.

The word "acquire" in the exception to S. 8 cannot be restricted to particular modes of acquisition. It includes acquisition by surrender or abandonment.

Per *Spencer, J.*—The proviso to S. 153 takes the case of non-occupancy ryots of old waste holding under expired leases granted before the passing of the Act out of the jurisdiction of the Collector's Court. In such cases, the landlord has got the same rights as he would have and the Act had not been passed and can enforce them in Civil Courts.

S. 157 has not the effect of nullifying the provisions of S. 158 but only prohibits a tenant of old waste being ejected as such even if he has signed an agreement to quit.

Achapparaju v. *Krishnayachendralu* (24 M. L. J. 402) explained.

A tenant of old waste who at the time of the passing of the Act was in possession under a time expired lease and whom the landlord has not, by accepting rent or otherwise, recognised as tenant is liable to be evicted in Civil Courts under S. 163 of the Estates Land Act.

Words "admitted as ryot" explained.

Ponnusamy Padayachi v. *Karuppudayan* (Miller and Spencer JJ.) 285

——**Sec. 8 Cl. (1) (2) (3) (4) Ss. 77, 189**—*Suit by Landholder purchasing Kudivaram before the Act, for rent—Not cognisable by Civil Court—S. 8 Cl. (4) not applicable to tenants not let into possession after the Act.*

As, under S. 8 Cl. 3 of the Estates Land Act, merger of the occupancy right by transfer or succession under Cls. (1) & (2) has not the effect of converting ryoti land into private land, a suit for rent even by a landholder who had become the purchaser of the occupancy right before the passing of the Act can be brought only in Revenue Courts.

The benefit of S. 8 Cl. 4 does not avail against tenants who were not let into possession after the Act was passed but were in possession before and at the time of the passing of the Act.

Veerappa Chetti v. *Mudali* (Sankaran Nair J.) ... 978

——**Ss. 131**—*Fraud—Right of suit to set aside sale, on the ground of—Jurisdiction—Civil Courts.*

The right conferred by S. 131, Estates Land Act to set aside a sale by application to the Collector does not take away the right of suit in the ordinary Civil Courts to set aside the sale on the ground of fraud.

S. 189 of the Act only takes away the right to apply to the Civil Court to enforce the right conferred by S. 131.

Ghouse Moideen Sahib v. *Muthialu Chettiar* (Sadasiva Aiyar and Spencer JJ.) ... 36

——**S. 151**—*Joint owners—Suit by one co-owner making the other party defendant—Maintainability of—Transfer of tenant's interest to the other co-owner—Remedy—Suit for joint possession or partition—Revenue Courts—No jurisdiction to order.*

Where in a suit brought by a co-owner against a tenant under S. 151 of the Estates Land Act making the other co-owner a party defendant, it was

Estate Lands Act—(*Contd.*) PAGE.

found that at the date of the suit the interest of the tenant had vested in the latter by transfer.

Held, that the suit, though not liable to dismissal on the ground that both the co-owners were not party plaintiffs, should nevertheless be dismissed as the remedy of the plaintiff under the circumstances was to sue either for joint possession or for partition for neither of which reliefs a suit is maintainable in the Revenue Courts

Subramanian Chettiar v. *Periasami Thevar* (Sadasiva Aiyar and Seshagiri Aiyar JJ.) ... 496

——— **Ss. 153, 157, 163.**—Jurisdiction of Civil Courts, ejectment, Inamdar 285

Ethics of Cross-examination.—*Suggestion of counsel acting under instructions—Dishonest Act—Duty to substantiate the charge or withdraw—Jurisdiction of the court to pronounce upon the matter.*

Their Lordships held that they had no authority to pronounce on the matter but at the express invitation of Counsel on both sides expressed it as their "pious opinion that the imputation complained of ought in the particular circumstances to have been withdrawn.

Messrs. Crompton & Co. v *Secretary of State for India* (White C. J and Oldfield J). 549

Evidence—Proof of relationship—Discrepancies in oral evidence—Court's duty, Recitals as to the existence of necessity—Alienation by a Hindu Widow 442

———Additional evidence in Appellate Court 153

———Letter affecting immoveable property--unregistered--admissibility of. 151

———Recitals as to the existence of necessity—Alienation by a Hindu widow 442

——— **Act Ss 26, 27**—"*Relating to discovery*"—*Statement that accused stole the money and the money was in a heap of rubbish—First statement inadmissible—Admissible to prove money to be stolen money—Production by the accused himself—Admissible notwithstanding.*

Where an accused person stated to the police that he stole the missing money and that it would be found in a heap of rubbish (close to his house) and immediately after went to the place and took out the coins,

Held that the statement that he stole the money was inadmissible but the other statement *viz.*, that the stolen money would be found in the heap of rubbish was admissible not only for showing that certain property was found in the rubbish but also for showing that that money was the missing money

The fact that the articles were taken out by the accused himself and the Police did nothing towards the discovery does not make the statement one unconnected with the discovery and therefore inadmissible

Queen Empress v. *Nana* (14 B. 260) followed.

Manjunatkaya v *Subaraya Bhatta* (Sadasiva Aiyar J.) 352

——— **S. 92**—Law merchant—admissibility of 113

——— **Ss. 106, 114**—Burden of proof—Presumption 89

Execution—*Mortgage decree—Death of judgment-debtor—Legal representatives not brought on record—Sale—Mortgage purchaser—Notice setting aside—Limitation Act (IX of 1908) art. 166.*

When in execution of a mortgage decree the mortgagee who had notice of the death of the judgment debtor without bringing on record the legal repre-

Execution—(*Contd.*) PAGE.

sentatives brought the property to sale and purchased the same himself *held*, that the sale was a nullity against the representatives of the judgment-debtor

Grieves v. *Administrator-General* (22 M. 119) *Krishnayya* v. *Unnisa Begam* (15 M. 399) *Ramasami* v. *Bagirathi* (6 M. 180) followed: *Mallikarjun* v. *Narhari* (25 B. 337) distinguished.

30 days limitation does not apply when the sale sought to be set aside is a nullity and not merely irregular.

RayarappanNambiar v. *Malikandi Aketh Mayan* (Sankaran Nair and Ayling JJ.) 267

Execution—Oral application for adjournment—Step in aid of execution 488

Execution Sale—*Misdescription—Identity—Difference between—Attachment—Power to sell confined to property attached—Property described as subject to reverse—Sale of—Substitution of property not subject to mortgage—Ultra vires—Mistake—Nature of documents relevant, to affect auction purchaser—Remedy of decree holder when wrong property attached and sold.*

In execution of a decree, application was made for the attachment and sale of certain property which was described in the schedule. The property was attached and sale ordered as prayed for. The property was described in the schedule as a 6 annas share in certain property mortgaged to one A. R. At the time the whole property was owned by the judgment-debtors of which 10 annas was under mortgage to A. R. and 6 annas was not. In the sale that took place, respondents became the purchasers and applied for sale certificate. When so applying, they alleged that a mistake had been made in the schedule of the property to be sold in that the word "not" had been omitted from the description of the 6 annas in quetion and that the property should have been described as being 6 annas not mortgaged under the bond of A. R. The court granted them certificate in the form they desired.

Held: The effect of the court's order was to make the sale that of a property not attached. As the court could only sell property which is attached, the order was beyond its powers.

That which is sold in a judicial sale can be nothing but the property which is attached and that property is conclusively described in and by the schedule to which the attachment refers.

A property fully identified in the schedule may be in some respects misdescribed. Such misdescription may be disregarded as mere irregularity. But where existing property is accurately described in the schedule it is no longer a case of misdescription but one of identity

Want of correspondence between the advertisement in the Calcutta Gazette and the description in the schedule (the former describing the shares as unencumbered) was an irregularity which would require the assistance of the court to cure it if the sale were regular in other respects but it cannot validate the sale of property to which the attachment did not relate.

If, by mistake the wrong property is attached and ordered to be sold, the only course open to the decree holders on the discovery of the mistake is to commence proceedings against. They could not turn authority to sell one property into authority to sell another.

Execution Sale—(*Contd.*) PAGE.

The only relevant documents to show mistake which can affect the purchaser are documents of which knowledge can be attributed to the public to whom the property is offered for sale.

In the result, their Lordships set aside the order confirming the sale together with the certificate granted under it.

Rajah Thakur Burmah v. *Jiban Ram Marwari* (*P. C.*) 89

Execution Sale—mortgage decree—legal representative of judgment-debtor not brought on record, mortgagee purchaser—nullity ... 267

Factum valet,—does not apply to the exclusion of a legal rule 260

Fraud of creditor—Alienation—Transfer for consideration—Want of good faith 479

General Clauses Act X of 1897. S. 10, suits under S 77 of the Registration Act XVI of 1908. 307

Hindu law Alienation—Raising funds for the defence of the head of the family—Binding nature—Sales governed by the same principle as charges ... 52

——— Adoption—Joint power of adoption to two widows, if valid—If may be exercised by the surviving widow—Religious and secular purpose of adoption 411

——— *Alienation—Widow in possession—Legal necessity—Onus of proving legal necessity—Nature of evidence—Recital in deeds insufficient—Relationship proof of discrepancies in oral evidence*

The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser and in the absence of evidence to prove legal necessity such as would bind the estate, the purchaser must fail.

Recitals in mortgages or deeds of sale by widows with regard to the existence of necessity for the alienation are not by themselves evidence of the fact. To substantiate the allegation there must be some evidence *aliundi*.

Where witnesses have to prove only one link in the chain of relationship the discrepancies in their statements on material points should not be lightly passed over.

Lala Rup Lal v. *Mt Inda Kunwar* 442

——— *Alienation—Joint family—Alienation by member—whether alienee tenant-in-common—out caste—Exclusion.*

The 3rd defendant one of five coparceners conveyed to the predecessor in title of the 1st defendant, his 1/5 share in the family property by Exh. I in 1891. Subsequently two of the coparceners died and the 3rd defendant in 1904 conveyed by Exh. A, his interest in the family properties to the plaintiff Plaintiff brought the present suit for recovery of the share conveyed. The difference was that the 3rd defendant by the execution of Exh. I ceased to be coparcener and that plaintiff obtained nothing under Exh A.

Held that.

Where a member of a joint Hindu family alienates his share, the alienee does not become thereby a tenant in common with the other coparceners; he can only enforce his right by partition.

The alienor remains a member of a coparcenary and his share fluctuates according as there are births and deaths subsequent to the alienation.

Where a member of a joint Hindu family becomes an outcaste and is excluded from enjoyment of the property for more than 12 years his right in the family property becomes extinguished and he cannot subsequently alienate the property.

Nanjaya Mudali v. *Shunmuga Mudali* (Sankaran Nair & Bakewell JJ.) 576

Hindu Law—(*Contd.*) PAGE

————*Alienation—Ancestral property—Suit to set aside same by son—Burden of proof on alienee to prove antecedent debt or justifying necessity—Consideration partly found to be binding on the son—Decree—Form of.*

In a suit by sons to set aside alienation of ancestral property by the father, the onus is on the alienees to prove that there was an antecedent debt or a justifying necessity for the alienation, (29 M. 200, 31 All. 176; 28 M. L J. 211 25 M. L. J. 27 ref).

Where the alienation is found not binding on the sons the alienee acquires the quantum of interest of the alienor at the date of the alienation without any liability to increase or diminution by virtue of subsequent changes in the joint family, (35 M 47). In case of alienation by a Widow or Guardian or Dharmakartha, the alienation if to a greater extent than is necessary will be set aside on payment to the alienee of the amount which is binding.

Where only a portion of the consideration is found to be for a necessary purpose, the proper decree to be framed will be to give the father's share in the property to the alienee to give a charge in favour of the alienee on the share of the sons to the extent of their share for the consideration which was found to be for a binding purpose. The shares are to be worked out as in ordinary partition.

Seetharam Naidu v. *Balakrishna Naidu* (Wallis J.) 604

————*Dayabhaga School—Joint family—Self acquired property—Source of payment of purchase money—Procedure-concurrent findings—presumption.*

Where properties stood in the name of a junior member of a Hindu family governed by the Dayabhaga Law, the other members of the family being his father and brothers, and the question was whether those properties were his own or were acquired in his name by the father.

Held that in the absence of evidence that he had any separate funds or that the properties were acquired with money belonging to himself, the presumption was that they were acquired by the father in his name and were not his self acquisition,

Held further that the question whether the properties were self acquisition or not was a question of fact and the courts below having concurrently found against the plaintiff their Lordships could not go behind the finding.

Parbati Dasi v. *Baikuntha Nath De* (*P. C.*) 248

————*Decree for partition—compromise by father without leave of court—Satisfaction entered up—Declared not binding against son—Remedy of the son—C. P. C., S. (244 N. C. 47)—Conversion of a plaint into application—Compromise binding to the extent of the share of father as at the date of compromise—Status of the family, joint—Subsequently born sons entitled to participate in the order.*

Where in a suit for partition, plaintiff's father got a decree representing his branch then consisting of himself and of his minor son, the plaintiff who was also a party to the suit, and subsequently entered into a compromise by which he entered up satisfaction of the decree, which was held by the Privy Council not to be binding against the son the compromise being without leave of the court.

Held that the proper remedy of the plaintiff was to move by application under S. 244 (S. 47 N C.) to reopen the satisfaction entered up and on such application the court could grant him all the appropriate reliefs.

Hindu Law—(*Contd.*) PAGE.

The plaint was accordingly converted into an application under S. 244 C. P. C. and disposed of on that footing,

Held also that the compromise was binding to the extent of the father's share which was to be calculated as it stood at the date of the compromise *viz* one half.

Held, nevertheless, that the family continued joint even in respect of the subjectmatter of the compromise and the subsequently born sons were entitled to participate in the remaining half.

Ganesh Row v. *Tulja Ram Row* (Wallis J.) 169

———Disqualification from inheritance—An incurable tumour on the nose, whether 508

———*Female heirs holding for limited estate—Partition so as to preclude survivorship permissible—Deed—Construction—Words sufficient for the purpose.*

Female heirs holding for limited estate can so divide as to preclude the rights of survivorship *inter se*.

The use of the words "Santati Paramparya mayi" "Sarva swatanthra Badiya mayi" with reference to the interest of each is a circumstance from which the intention to give up the right of survivorship may be legitimately inferred. Words like "We have no connection with each other's rights of properties" would place the matter beyond controversy.

Subbammal v. *Lakshmana Iyer* (Sadasiva Aiyar and Spencer JJ) ... 479

———*Husband and wife—Joint exertions—Property acquired by—Property of both—Share of wife descends to her heirs—Stridhanam.*

Where property was acquired by a man (a Hindu) and his wife.

Held, that the property belonged to both and on the death of the wife, her share descended according to the rules of inheritance prescribed for stridhanam. *Muthu Ramakrishna Naicken* v. *Marimuthu Goundan* (Sankaran Nair and Ayling JJ) 532

———*Impartible estate—Widow of junior member—Right to maintenance—Member's right to fix descendants' maintenance—Lower rate allowed as past maintenance—Delay in suing—Limitation Act, art. 129—Demand and refusal—Burden of proof.*

Widows of junior members of a family owning an impartible estate are entitled to receive maintenance out of it; *Tiruml Rao Saheb* v. *Ranga Rao Saheb* (23 M. L. J. 79) approved.

Quaere, if a member can bind his descendant to receive a particular amount as maintenance out of the Zamindari.

Under Art. 129, Limitation Act the onus of proving that there was a denial in respect of the plaintiff's right of maintenance more than twelve years before suit is on the defendant.

In the circumstances of the case, having regard to the fact that there was great delay in making the claim and it was not shown that the plaintiff had to borrow money or had difficulty in maintaining herself, she was allowed for past maintenance a lower rate than was allowed for years after suit.

Rangappa Kalakka v. *Kulandai Ayal* (Miller and Tyabji JJ.) 205

———Inheritance—Incurable tumour on the nose—Not a disqualification, 508

———*Inheritance—Step-mother—Mitakshara Law—Bandhu or Gotraja Sapinda—not entitled to inherit.*

Under the Mitakshara Law a step-mother is not entitled to succeed to the property of her step-son either as Gotraja Sapinda, or as a relation. She is not in the line of heirs at all apart from usage. *Mari* v. *Chinnammal* (8 M. 107) followed.

Hindu law—(*contd*). PAGE.

To admit any relations other than those coming within the known categories is inconsistent with the Mitakshara scheme of inheritance.

In this case the usage set up in favour of step-mother's right of inheritance was found against.

Seethai Ammal v. *Nachiyar Ammal* (Miller and A. Rahim J.) ... 10

————*Joint family—Sale—to raise funds for the defence of the head of the family—Criminal case—Binding nature of—Principles as to charges—applicable to sales.*

Sale for the purpose of raising funds for the defence of the head of a joint Hindu family in a criminal case is for a necessary purpose and is binding against the other members of the family.

Beni Ram v. *Man Singh* 34 A. 4 *Suman Singh* v. *Liladhar* 33 A. 472 followed

The principles laid down in *Hanuman Persad Panday's* case 6 M. I. A. 393 to charges apply *mutatis mutandis* to sales.

Ramalingam Pillai v. *Muthayan* (Tyabji and Spencer JJ.)... 528

————*Married Woman—Conversion to Mussalman faith—Marrying a Mahomedan during the life time of her Hindu husband—Legality—Offspring of such second union—Legitimacy—Right to shares—Mahomedan law—Paternity—Acknowledgment.*

A Hindu married woman became a convert to Mahomedanism and during the lifetime of her Hindu husband married a Mahomedan and had several children, *Held* that the second marriage was illegal and the children who were born of this union were illegitimate.

Under the Hindu law apostacy or conversion does not dissolve the marriage tie.

Per Spencer J (Sadasiva Aiyar J concurring).—Under Mahomedan Law the marriage of a man with the wife of another man is not permitted so long as the first marriage is subsisting. Such a union will not merely be invalid but void and illegal.

The Mahomedan and Hindu Laws being personal, attached to the followers of each religion wherever they may be living. (Here the first marriage was in French territory in India and the second in British India.)

A mere recognition of paternity is not equivalent to a recognition of legitimacy and that acknowledgment cannot make the offspring of *zina* (adultery) legitimate.

In the matter of Ram Kumari 13 C. 264 *Emperor* v. *Lazar* 30 M. 550 *Sundari* v. *Pitambur* 32 C. 871 *The Government of Bombay* v. *Ganga* 4 B. 330 *Jamna Devi* v. *Mul Raj* 12 P. R. Judl 198 foll.

Where a conflict occurs between persons belonging to different religions, the courts must apply the rules of Justice, Equity and Good conscience. 28 M. 171 ref.

In testing whether the 1st marriage of a Hindu woman with a man of her own class was subsisting or not at the time of her 2nd marriage with a Mahomedan after she became a convert to Mahomedanism, the principles of Hindu Law must be applied. But in testing the validity of her second marriage the principles of Mahomedan Law should be applied.

If there is a custom among any community of allowing a woman to marry again during the life time of her first husband without any defined rules by which the marriage with her first husband is dissolved before the

Hindu Law—(*contd.*) PAGE.

second marriage is contracted, such a custom is contrary to public policy and morality and cannot be recognised by courts.

Per Sadasiva Aiyar J:—The doctrine of *factum valet* can never excuse the violation of a legal rule. India is not a non-Islamic country.

Budansa Rowther v. Fatma Bi (Sadasiva Aiyar and Spencer JJ.) 260

———*Self—acquisition—Substantial nucleus—Burden of proof—Incurable tumour on the nose—Not a disqualification from inheriting.*

Where there is a substantial nucleus of ancestral property, the burden is on the party asserting self-acquisition to prove it.

An incurable tumour in the nasal cavity and on the nose is not a disease which disqualifies a person from inheriting under the Hindu law. *Venkatasubba Raw* v. *Purushottam* (26 M. 133) *Kayarohana Pathan* v. *Subbaraya Thevan* 25 M. L. J. 251 referred to

Subba Naidu v. *Venkatrama Naidu* (Sadasiva Aiyar and Seshagiri Aiyar JJ.) 508

———*Suit for restitution of conjugal rights—Ill health of the wife—Refusal by parents once to give custody—No defence.*

Neither the ill-health of the wife nor the fact that her parents had at one time refused to give the husband the custody of the wife is a defence to a suit for restitution of conjugal rights brought by the wife.

Kuppammal v *Kuppana Chari* (Bako well J) 368

———*Survivorship—Attachment before judgment—Decree following—Precludes accrual of title by.*

An attachment before judgment followed by decree precludes the accrual of title by survivorship as against the attaching creditor.

Ramayya v. *Rangappayya* (17 M. 144) *distinguished*. *Krishna Rau* v. *Lakshamana Shanbhogue* (4 M. 302) *applied*.

Muthusami Chetty v. *Chinnammal* (Sankaran Nair and Ayling JJ) 517

——— Widow—Alienation—Onus of proving necessity. 442

———*Will—Construction—Joint power to adopt given to two widows—Validity of—Survival after death of one—Contemporaneous written document referred to in the Will—Admissible to construe Will—Duty of the Court to ascertain true intention—English rules of construction—Applicability to Hindu Wills—Giving liberal interpretation to Native Wills—Meaning of—Costs.*

Where a Hindu made a Will providing *inter alia* that his two widows "should divide in equal shares my zamindari * * * * *......both should maintain our samasthanam clerks, dasis and servants * * * * *......should adopt a boy who is our *sannihita* (one closely related) whenever it strikes you that our samasthanam should continue"

Held: that the dominating motive of the Will was secular and in the absence of a direction that an adoption should take place in all events the Court was not justified in interpreting the provisions of the Will in any special manner;

That according to the plain meaning of the words the power given to the widows to adopt was a joint power resting in the discretion of both and as such, was not exercisable after the death of one of them.

Death of one of the donees puts an end to a joint-power. This is not by virtue of any peculiar doctrine of English Law, but flows from the nature of joint powers.

If a power is given to A and B *personæ designatæ* to do an act if and when they think it desirable, the occasion cannot arise and the power cannot be exercised unless both are living and in agreement as to the act. The case is different when the power is vested not in *personæ designatæ* but in the occupants for the time being of a specified office.

Semble: Power given to more than one wife to adopt need not necessarily be invalid, though one only can receive the child in adoption so as to step into the position of the adopted mother.

Held also that as the will referred only to the period of time when both widows were living and was silent as to the period after the death of one of them, to hold that the survivor could adopt a son, would be to provide for a period of time which the testator left unprovided for and unnoticed in the Will, in other words, would amount to making an addition to his testamentary dispositions, a thing that no court is entitled to do

In judging of the light in which the directions of the testator are to be regarded, it is legitimate to look at a contemporaneous document referred to in the Will which he wrote and caused to be written with the express intention to render clear his wishes with regard to his succession.

In all cases, the primary duty of the Court is to ascertain from the language of the testator what were his intentions *i. e* to construe the will. In so doing the Court is bound to consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things which are summed up in the phrase "the Court is entitled to put itself into the testator's armchair". Among such surrounding circumstances none would be more important than race and religious opinions and the Court is bound to regard as presumably and (in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to right construction and once the construction is settled the duty of the court is to carry out the intentions as expressed and none other and in no case is the court justified in adding to his testamentary disposition.

The fundamental principle above referred to does not clash either with the principle that the court will not necessarily apply the English rules of construction or the other principle *viz.* of giving a liberal interpretation to Native Wills.

The English rules of construction amount in many cases to nothing more than saying that a special phrase which may be used in more than one sense shall *prima facie* be deemed to be intended to bear one particular meaning, unless from the consideration of the context or surrounding circumstances, the court can come to the conclusion that it is used in a different sense. In other cases the rules are the expression of such tendencies in the Court as the desire to avoid an intestacy or the presumption in favour of the immediate vesting of an estate. Such rules are purely an English product based on English necessities and English habits of thought and there would be no justification in taking them as guides in construing Indian Wills.

What is meant by "giving liberal interpretation to Native Wills" is that, the native testators should be ignorant of the legal phrases proper to express their intentions or of the legal steps necessary to carry them into effect, is one of the most important of the surrounding circumstances which the Court must bear in mind and the Court is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions.

Hindu Law—*contd.* PAGE.

Costs having been incurred on what were really the merits of the case, the consideration of which was rendered unnecessary by the determination of the points of law and having regard to the value of the estate and the difficulties of the inquiry their Lordships made no order as to costs.

Raja Venkata Narasimha Appa Row v. Raja Parthasarathi Appa Row. (*P C.*) 411

———Will, Construction, "Aulad," Issue by a Hindu and a Mahommedan woman 291

———Will, Construction—English Rules applicability to Hindu Wills—Giving liberal interpretation to Native Wills ... 412

———*Will—Construction—Hindu Wills Act,—Reference to, as embodying rules of justice, equity and good conscience—Vested interest—Devise in favour of widow and nephew—Nephew to take properties on the death of the widow if living amicably—Words of disposition—Absence of—Declaratory relief—Practice as to grant of.*

In the absence of any statutory provision governing the construction of wills in the Mofussil, Courts are justified in referring to the provisions of the Hindu Wills Act as embodying the principles of justice, equity and good conscience.

Where a testator (Hindu) made a will in favour of his wife and nephew providing *inter alia* " all my properties should after my death be in possession of my wife herself and she herself should be heir to everything and Muthu Arunachella Chetty (nephew) and my wife should live together amicably as of one family If the two could not agree and live together amicably, my wife should pay Rs. 4000 and separate him and then my wife should enjoy all the remaining properties with absolute rights. If both of them should live together amicably, Muthu Arunachala Chetty himself should enjoy the properties which remain after the death of the widow "

Held, upon the construction of the will that the nephew who lived amicably with the widow till his death, had a vested interest at his death which could not be defeated by a testamentary disposition by the widow in favour of a stranger.

Held also, neither the widow nor the daughter of the nephew being interested in questioning the disposition, as the daughter was herself one of the legatees and having regard to the fact that the lower Court had given an adverse decision on the question of construction, a decree should be made declaring the proper construction of the will

Words of disposition which are usually found in wills made in England under legal advice cannot be expected in the wills made by Hindu laymen in the mofussil and the intention to make a disposition should not be negatived merely by reason of the absence of those words.

Ratna Chetti v Narayanaswami Chettiar 616

———*Will—Presumption of law—Status of witnesses—C. P. C. S. 568—Admission of documents by the Court of Appeal to discredit witness—No opportunity given to witness to explain discrepancy—Practice—Special leave to appeal after leave to appeal by High Court was withdrawn—Evidence that others used to sign blank sheets—Inadmissibility of.*

Where a childless Hindu had made a will in favour of his sister's son whom he treated with regard and affection and the will was attested by the testator's dewan, a servant who was in charge of his wardrobe and his trea-

Hindu Law—(*contd*). PAGE.

surer, on the will being challenged by the heir at law whom the testator did not like :—

Held that having regard to the relations of the parties to the testator the will was a natural will and in accord with his feelings and tenor of life and as its execution was proved by reasonable evidence the presumptions of law were in favour of its being maintained.

Held, also, that the attestation by servants was not in itself impeachable unless there were reasonable grounds for suspicion that the will was not the voluntary act of the testator but one pro-cured by undue influene.

Held, further, that admission of documents in the Court of Appeal under S. 568 of the Code of Civil Procedure to throw doubt upon the testimony of a witness examined in the lower Court, but who was given no opportunity to clear up the discrepancies was an undesirable procedure as no witness then could be free from adverse judicial comment.

Choteynarain Singh v. *Mussamat Ratan Koer* 22 C. 519 approved.

Held evidence that some other people were in the habit of having sheets of paper signed in blank was irrelevant to the question whether the will was executed by the testator

In this case, special leave for appeal was granted by their Lordships after the leave to appeal granted by the High Court was withdrawn by reason of the appellant failing to make the necessary deposit for printing etc. in time.

Jagrani Koer v. *Durga Parshad* (*P. O.*) 153

———— *Will Gift to daughters and in certain event to their sons—construction Survivorship—interest of survivor—Costs.*

A Hindu testator having by his will directed the executors "to make over and divide the whole of my estate unto and between my daughter in equal shares to whom and their respective sons,I give devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, then and in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons share and share, alike." On the decease of one of the daughters her sons claimed half the estate under the Will :

Held that on the death of the younger daughter leaving male issue the estate did not pass over for life to the elder daughter but to the sons of the deceased daughter who were living at the time the testator died. Their Lordships stated that the order was not to prejudice the rights of the grandchild of the testator adopted after the testator's death.

Their Lordships directed that the costs of the parties as between solicitor and client should come out of the estate.

Sreemutty Ranmoni Dasi v. *Radhaprasad Mullick* (P. C.) 653

Hypothecation—*Sum kept with mortgagee to be paid to a third person, the right of such third party to sue the mortgagee for money so reserved.*

One executed a hypothecation bond in favour of defendants and kept a portion of the amount with defendant " in order to be paid to and get a receipt from plaintiff on account of balance due to him for purchase of yarn." Plaintiff who was not a party to the contract sued to recover the amount. Courts below dismissed the suit on the ground that there was no privity of contract,

Hypothecation—*contd.* PAGE,

Held that the proper person to sue was the promisee and that plaintiff being a stranger to the contract though entitled to a benefit under it was not entitled to sue.

Iswaram Pillai v. *Taregan* (Ayling and Tyabji JJ.) 258

Inam—Granted before permanent settlement, Not "Estate" 127

Interim stay—not communicated effect of on subsequent proceedings—substantial injury not necessary .. 275

Joint power—to personæ designatæ—Whether can be exercised by survivor ... 411

Jurisdiction—Valuation—Same as Court fees 578

———Suit by one co-owner for joint possession or partition whether maintainable in Revenue Courts 435

———of Civil Courts, Ejectment, Inamdar 285

———Civil Court, Suit for rent, Landholder purchasing Kudivaram before the Estates Land Act 373

Justice—Equity and good conscience Rule, of—applicable where conflict between persons of different religions 260

Kanomdar—Decree for redemption on any day between two dates, Emblements 348

Landlord and Tenant—*Diluvion—Submergence and reformation in situ—Bengal Act VII of 1869, S. 19—Abatement of rent—Effect of—Until abandonment, Right to submerged lands remains—Remission of rent, not evidence of—Regulation (Bengal) XI of 1825, S. 4.*

Where lands forming part of a *patni* became submerged by river action but subsequently re-appeared and reformed *in situ*.

Held, that until it is established that the holder of the tenure has abandoned his right to the submerged lands, it remains intact.

The fact that he has claimed or accepted remission of rent in respect of those lands is not proof of such abandonment.

Nashar Rai v. *Raingat Singh* 18 A. 290 approved and followed.

Hemnath Dutt v. *Askghar Sindar* 4 C. 894 overruled.

Arun Chandra Singh v. *Kamini Kumar* (*P.C.*) 251

———*Raising wet crops paying particular cist—Claim for a higher rent—Unsustainable without notice in time of intention to demand higher rent.*

Where it appeared that for a number of years the tenant was cultivating the land with wet crops paying a kist of 15 as. 10 pies per acre.

Held : that the landlord was estopped from claiming more for any fusli when he had not given the tenant timely notice that he was going to make a higher claim as in that case the tenant might have elected to raise only dry crops.

Subbia v. *Venkataramiah Appa Rao* ... 217

Legitimacy—Offspring of a Hindu woman converted to Mahomedanism marriage during the life time of Hindu husband 260

Lessor and lessee—*Variation of rent—Unregistered document—Consideration, necessity for acceptance of reduced rent—Being voluntary and temporary—Presumption of—Deed—Construction—Boundaries and area—Conflict between—Evidence to show that area within boundaries less—Negotiations—Admissibility of—Abatement of fixed rent—Burden of proof—Act of Court leading to reduction of area—Not ground for abatement—Partial tender of rent—Effect of.*

Lessor and lessee—*contd.* PAGE

Where a lessor by a pattah had leased out land described as 400 Bighas and lying within certain boundaries, containing coal mines, at a rent of Rs. 2800, the lessee took possession without raising any objection as to the extent of land he was given possession of, and worked the mines underneath. Subsequently, on representations made to the lessor that the coal was not of good quality, the rent was reduced to Rs. 2000 by an unregistered document. This arrangement lasted for some years when the heirs of the lessor claimed the original amount of rent, but the lessee tendered it at the reduced rate claiming to do so on the footing of the arrangement and also on on the ground that the land was less than 400 bighas and that he was, therefore, entitled to an abatement.

Held, that the agreement was inadmissible in evidence as it was unregistered and that it was also unenforceable being without consideration.

That the acceptance of reduced rent was consistent with the reduction being voluntary and temporary and did not preclude the lessor from claiming the full rent.

That the question as to what had been demised depended entirely upon the construction of the lease and that construction could not be varied by extraneous evidence as to the negotiations that led up to the contract or by evidence showing that within the boundaries specified in the lease, there were not 400 bighas of land.

That the burden lay on the defendants to make out a case for abatement of fixed rent and they had failed to discharge the same.

Held, accordingly, that the tenders of rent and of interest on arrears of rent being based upon a reduced rent were not good tenders, either as tenders of rent or of interest and were therefore ineffective.

Plaintiff had previously sued the defendant for an injunction to restrain him from trespassing on Mouzah Jharia Khas under pretence of the lease but the Court inadvertently passed a decree restraining the defendant from working coal outside the area in Mouzah Dobari as delineated in the Amin's map. Defendant failed to appeal against the said decree.

Hled : The fact that the decree of the Sub-Judge prevented the defendant from working coal in the full area included in his demise was not a ground for abatement of rent. The proper course for the defendant was to have appealed against the decree and got the decree amended.

Raja Durga Prasad Singh v. *Rajendra Narayan Bagchi* (*P. C.*) 25

Letters Patent, Section 10—*Vakil—Glorification of himself and his professional power—Professional misconduct—Suggestion that he is in a position to influence Judge by improper means.*

A mere glorification by a vakil of himself and his professional powers may not constitute professional misconduct; but to suggest that he is in a position to influence the judge by indirect and improper means is professional misconduct meriting more than mere warning.

In the Matter of a High Court Vakil (*F. B.*). 429

——— Cl. 10—Vakil—suggestion that he is in a position to influence judge professional misconduct—High Court—Suspension 429

———Cl. 12—*Jurisdiction—Suit for land—claim for damages for trees cut—Test—Determination of title so as to preclude its being raised in another suit—Original side—Practice—Counsel's fees—When instructed by party and by Vakil.*

Letters Pa ent Section 10—(*Contd.*) PAGE.

Where, on the allegations in the plaint, title to land has to be determined either expressly or by implication so as to preclude it from being raised in any subsequent suit, the suit is one for land within the meaning of cl. 12 of the Letters Patent.

Held, accordingly that a suit for the recovery of damages for trees cut and carried away from the plaintiff's casuarina plantation was a suit for land within the meaning of that article.

Where counsel appears instructed by the party in person, the latter is entitled to claim as part of the costs decreed to him the reasonable fee paid to his counsel Where counsel is instructed by a vakil, the Taxing Officer or the court may certify for his fee in which case it will be recoverable in addition to the ad valorem fee allowed for the vakil.

Srinivasa Aiyangar v. *Cunniappa Chetty* (Sankaran Nair J.) ... 567

———*cl. 15—Order as to costs—Appeal from—Order incidental to Judgment—Interference in appeal when meaning of judge's order not clear—Time taken by review petition—No deduction for—Limitation.*

An appeal lies under the Letters Patent from an order as to costs merely when that order is only incidental to a "judgment."

Manali Saravana Mudaliar v. *Rajagopala Chetty* (17 M. L. J. 569) distinguished.

Where the trial judge made an order that the costs should follow the event but it was not clear as to how the learned judge intended the order to be worked out their lordships felt themselves at liberty to interfere with the order as the order as interpreted was not a proper order.

An appellant cannot claim deduction for the time taken by a review petition presented by him.

Numberumal Chettiar v. *Krishnajee* (White C. J. and Oldfield J.) 856

———Cl. 15 order as to costs, appeal from interference in appeal 356

Limitation under **Act III of 1905, S. 14** 60

———**XV of 1877, S. 20**—To constitute agency under—Not necessary that exercise of authority should be obligatory ... 509

———**XV of 1877, S. 20**—Mortgagee directed to pay in full a debt of the mortgagor—No authority to make a payment of interest as such 509

———**Act, XV of 1877, Art, 148**—Redemption—Mortgage by conditional sale—Time specified in the deed—When limitation commences to run 474

———**S. 4**—Plaint signed by one plaintiff—Represented with the signature of the other plaintiff after the period of limitation—Ineffectual ... 494

———**S. 4**—Time taken for review, no deduction for, calculating time for filing appeal ... 856

———**(Act IX of 1908) S 4**—*Applicability—Suits under S. 77 of Registration Act—Last day holiday—Presentation next office day—General principles—General Clauses Act (Act X of 1897) S 10—Refusal to register—Executant failing to appear on summons—Order returning document on plaintiff's application to return.*

Though the provisions of the Limitation Act are inapplicable to suits provided for by S 77 of the Registration Act, the general principle recognised in S. 10 of the General Clauses Act, viz, that where a plaintiff cannot owing to the Court being closed present his plaint on a particular day on which it ought to be presented, he should not be allowed to suffer if he presents it at the earliest possible opportunity thereafter, applies to them...

Limitation Act—(*contd*). PAGE

Aravamudu Ayyangar v. *Samiyappa Naidu* I. L. R. 21 M. 385, *Sambasiva Chari* v. *Ramaswami Reddi* I. L. R. 22 M. 179, *Haji Ismail Sait* v. *Trustees of the Madras Harbour* I. L. R. 28 M. 889, *Messrs. Arbuthnot and Co.* v. *Sabapathy Mudaliar* 28 M.L.J. 221, referred to.

Where on the failure of the executant of a deed presented for registration to appear though twice summoned, the plaintiff asked the Sub-Registrar either to register or to return it to him and the Sub-Registrar returned it to the plaintiff.

Held that under the circumstances the Sub-Registrar's order returning the document amounted to a refusal to register.

Sivarama Patter Kariakar v. *V. Krishna Aiyar* (Miller and Tyabji JJ.) 807

———applicability, suits under Registration Act, S. 77... ... 807

———**S. 4**—*Benefit of—S. 81—Availability of, in suits coming under.*

The benefit of S. 4 of the Limitation Act can be invoked in computing the period prescribed by S. 81 of the Limitation Act.

Murugesa Mudali v. *Ramasami Chettiar* (Sadasiva Aiyar & Spencer JJ.) 23

———**Act IX of 1908, S. 10**—Assignee from trustee for consideration —With notice of the trust—Limitation runs in favour of ... 587

———**s. 20**—*Mortgagee directed to pay creditor of mortgagor in full—No authority to make payment of interest as such—To constitute agency under—Not necessary that exercise of authority obligatory.*

A mortgagee who is required under his mortgage document to pay a portion of the consideration to a creditor, of the mortgagor in discharge of the amount due to him, principal and interest is not an agent authorised to make payment of interest as such so as to keep alive the debt, his authority being only to pay off the debt in full.

To constitute a person an authorised agent within the meaning of the section, it is not necessary that the exercise of the authority should be obligatory; it is sufficient even if the exercise is optional.

Alagappa Chettiar v. *Subramania Pandia Thevar* 509

———Addition of unnecessary parties—Does not apply to 449

———**Art. 29, 62, 120**—*Attachment of debt—"Wrongful seizure of moveable property"—Suit by claimant to the debt attached against decree holder—Proper article applicable—Art. 62 or 120.*

Neither attachment of a debt nor payment in pursuance of such attachment constitutes "seizure of moveable property under legal process" within the meaning of Art 29 of the Limitation act. The proper article applicable to a suit by a claimant to the debt attached against the decree-holder to whom the amount of the debt was paid is either Art. 62 or Art. 120.

Yellamal v. *Ayyappa Naick* (White C. J., Sankaran Nair and Oldfield JJ.) (*F. B.*) 166

———**Art 116**—*Malabar Law—Suit for purapad—Assignee of Kanomdar —Both Kanam and assignment registered—Undertaking to pay purapad in the deed—Liability by privity of estate and not by reason of registered contract.*

In a suit by the Jenmi against the assignee of the Kanomdar for arrears of purapad, it was contended that Art. 116 of the Limitation Act applied first because the Kanom was registered secondly because the deed of assignment also was a registered deed and contained or implied an undertaking by the assignee to pay the purapad,

Limitation Act—(*Contd.*) PAGE.

Held that the liability of the assignee was by reason of his privity of estate and not by reason of any contract in writing registered between the Jenmi and the assignee and therefore the article was inapplicable.

Naduvil Edom Kelu Achan v. *Varadaraja Iyer* 283

———**Art. 116**, suit for purapad, kanom and assignment registered 283

———**Art. 129**—demand and refusal—Burden of Proof 205

——— 2nd *Schedule Art* 131—*Declaratory suits, whether confined to—suit to recover sum due under a periodically recurring right—Applicablity.*

Art. 131 of the 2nd Schedule of the Limitation Act is applicable to suit to recover sums due under a periodically recurring right whether there is a prayer for declaration of plaintiff's right or not.

Held, accordingly, that a suit for recovery of arrears of Adima allowance for a period of 8 years was not barred in respect of any portion of it.

Manavikarami Raja v. *Achutha Menon* 477

———**Art. 120 and 213** ... 213

———**Art. 131**—applicability of suits to recover sum due under a periodically recurring grant 377

———**Art. 164**—applicability to orders passed in execution 189

———**Art 166**, setting aside a sale which is a nullity, does not apply to. 267

———**Art. 182**—Step-in-aid of execution—wrong application 60

———**Art. 182, Cl. 5**—*Oral application for adjournment—To get encumbrance certificate in respect of the attached property—Application to take a step-in-aid of execution.* [illegible]

An oral application for adjournment made for the purpose of getting an encumbrance certificate in respect of the attached property is an application to take a step in aid of execution and would save limitation under art. 182 Cl. 5.

Abdul Kadir v. *Krishna* 488

———(**IX of 1908** , **Art. 182, Cl. 5**—Oral application for adjournment—Application to take a step in aid of execution ... 488

Lis Pendens—Alienee *pendete lite*—Whether necessary party ... 449

———**C P. C., O. 21, R. 63**—Suit under, only a continuation of the claim proceeding 449

Madras Act III of 1905 S. 14—*Land Encroachment Act—Suit for declaration of title—Levy of penalty for encroachment on land—Limitation, six months as provided in the Act.*

Where a person from whom penalty is levied under the Land Encroachment Act brings a suit for declaration of title to the land in dispute the suit will be governed by the six month's limitation provided in the Act.

Bhaskaradu v. *Subbarayyudu* ... 60

Madras Estates Land Act, S.3.—*Permanent Settlement-Inam granted before—Not "estate."*

An inam granted before the Permanent Settlement and which did not from part of the assets of the zamindari, is not an estate within the meaning of S. 3 of the Estates Land Act.

Veerabadrayya v. *Sonti Venkanna* 24 M.L.J. 659 followed.

Sanyasi Naidu v. *Venkatacharyulu* 258

———**S. 3** ; Inam granted before permanent settlement. Not "Estate" 258

———**S. 4**—*Landlord prima facie entitled to rent of all ryoti land whether cultivable or not—Rule displaced by agreement—practice before the Act to charge only cultivated lands-Binding after—Right to collect rent and*

Madras Estates Land Act—(*Contd.*) PAGE

basis of calculation—Basis of calculation not to be altered.

Per Chief Justice :—*Prima facie* the landlord is entitled to rent in respect of all ryoti land in the occupation of the tenant whether he has cultivated it or not but this general rule may be displaced by agreement between parties.

Per Tyabji J.—S 4 gives the right to the landholder to collect rent in respect of all the ryoti land in the occupation of the ryot but that section by itself does not suffice for the determination of the total amount of rent that has to be collected ; and where the practice before the Estates Land Act was to charge rent for all the lands cultivated by the tenant, to charge rent for all the lands whether cultivated or not would amount to an enhancement and be opposed to Chapter III of the Act.

Right to collect rent and basis of the calculation of rent distinguished.

Segu Rowthen v. *Alagappa Chetty* (Tyabji J.) ... 269

———Landlord *prima facie* entitled to rent on ryoti land cultivable or not -Rule displaced by agreement, Basis of calculation of rent ... 269

———I of 1908 S. 8 Cl. (1), (2), (3), (4), Ss. 77, 189 Jurisdiction of Civil Court—Suit for rent—Landholder purchasing Kudivaram before the Act 378

———I of 1908, S. 8 Cl. 4 ; Not applicable to tenants not let into possession after the Act 378

Madras Irrigation Cess Act (VII of 1865) S. 1—*Rules under—Penal rate—" Water taken from a source other than approved "—Meaning of—Presumption of taking—Insertion of second pipe—Liability though insertion not proved to be by plaintiff.*

Where plaintiffs' lands were irrigated from too pipes instead of one which was authorised but there was nothing to show that the plaintiffs were responsible for the insertion of the additional pipe.

Held per Ayling J. that water "was taken from a source of supply other than approved" within the meaning of the rules and plaintiffs were liable for a double or penal water rate.

Per Tyabji J. that in the absence of an explanation from the plaintiffs the water must be presumed to have been taken by them

Per Ayling J. Considerations of public policy cannot justify Courts in putting a strained construction on the rules but where the wording is consistent with what such considerations would dictate, they are not without weight.

Krishna Row v. *The Collector of Krishna* (Ayling and Tyabji JJ.) 210

Madras Municipal Act, (III of 1904), Ss. 33, 52. Rules under S. 418, Mandamus 310

Madras Regulation XXV of 1802—*Pre-settlement Inams—Lands held on Service tenure—Personal service to Zamindar—Service quasi public before settlement—Ceased to be such after—Presumption—Right to Resumption by Government—Burden of Proof as to exclusion at the time of settlement—Evidence Act, Ss. 106 and 114.*

Where lands in a Zamindary were granted before the time of the permanent settlement in inam on condition of rendering personal service to the Zamindar such as attending on him, following him with arms and guarding his treasury in addition to a favourable quit rent and the Government sought to resume the inams on the ground that they were presettlement inams

Madras Regulation—(*Contd.*) PAGE.

Held that the services being private and personal to the Zamindar *prima facie* the inams would form a part of the assets of the Zamindari and the Zamindar was the person entitled to resume.

The burden of proving that such lands were excluded from the assets of the Zamindari and that the right to resume belonged to Government lay on the Government.

Duties such as guarding the treasury which were quasi-public before the Settlement ceased to be such after the settlement and therefore, the same considerations that apply to Inams held on condition of personal service to the Zamindar apply also to Inams granted for the performance of those duties.

Held also that where services are rendered in addition to quit rent the lands do not come within the proviso to S. 4—Reg. XXV of 1802.

Per Tyabji J.—The Government having special means of knowledge as to exclusion or otherwise of the inams at the settlement from the assets the burden was upon them under S. 106 of the Evidence Act.

The Government not having produced the accounts in their possession the presumption that if produced the accounts would be unfavourable to them should be drawn against them.

Parthasarathy Appa Rao v. *Secretary of State for India* 39

Mahomadan law, marriage of a man with the wife of another issue, whether recognition of paternity renders legitimate 260

Malabar Compensation *for Tenants Improvements Act*, (*Madras Act I of* 1886)—*Covenants entered prior to* 1886—*Effect of.*

A contract entered into prior to 1886 regulating the rates of compensation claimable by the tenant for improvements or providing for methods of fixing the amount of compensation due to him without expressly referring to his right to make improvements is not binding on the tenant if it is less favourable to him than Ss. 5 and 6 of the Act and the tenant is entitled to claim compensation according to the provisions of the Act.

Randupurayil Kunhishore v. *Neroth* Kunhi Kunnan I. L. R. 32 M. 1, is not inconsistent with *Sreemanavikraman* v. *Ananda Pattar* I. L. R. 34 M. 61 and *Paru Amma* v. *Moothoran* 22 M. L. J. 221.

Kochu Rabia v. *Abdurahman* 523

Malabar Tenants Improvements Act,—Madras Act, I of 1886 covenants entered into prior to 1886—Effect of 523

——— Paddy plants Improvements 348

Malabar Law—*Kanomdar*—*Decree for redemption any day within two dates*—*Lease of uncertain duration*—*Emblements*—*Right to*—*Transfer of Property Act, S. 108* (*i*)—*Malabar Tenant's Improvements Act*—*Paddy plants, improvements.*

A Kanomdar against whom a decree for redemption is passed and who could be redeemed under the decree any day between two given dates is in the position of a tenant holding under a lease of uncertain duration and is entitled to the crops raised by him and standing on the land when he is redeemed.

Per *Sadasiva Aiyar, J.* (*Spencer J. doubting*). The paddy plants raised by the Kanomdar are improvements within the meaning of the Malabar Tenant's Improvements Act for which he is entitled to be paid.

Narayanan Nambudripad v. *Krishna Patter* (Sadasiva Aiyar Spencer JJ.) 348

Malabar Tenants Improvements Act (*Madras Act I of 1900*) *Ss. 3, 5—Tenant introduced by mortgagor after mortgage—Purchaser in execution of decree upon mortage—Right to improvements against—Right of tenant to improvements not confined against lesor.*

A tenant introduced into the land by the mortgagor after executing the Mortgage, is entitled on eviction by the purchaser in execution of the decree upon the mortgage to the value of improvements effected by him while on the land.

The right of the tenant under S, 5 of the Malabar Tenant's Improvements Act to claim improvements is not limited to his lesor.

Churiya Kunnum v. Thaharie Churuthan. 188

Mandamus, Madras Municipal Act, Ss. 33, 52, Rules under S. 418 810

Mirasi Tenure in Chingleput District—*Mokhasa Inam—Conversion to Shrothriem—Shrothriemdars, Ekabhogam mirasidar—Tenants in long possession—Madras Estates Land Act, Ss. 8, clause 2 (d) and 55—Revenue Courts—Jurisdiction of.*

Where in 1802, when a Shrotriam was granted, the grantee was also the mirasidar.—

Held: that there being nothing to show that the latter had lost the Kudiwaram right which *prima facie* vests in the Mirasidar, the village could not be held to be an estate within the meaning of S. 8 cl. 2 (d) of the Estates Land Act and an action for enforcing the tender of pattas is unsustainable.

Mirasi tenure, its origin and incidents discussed.

Per *Sadasiva Aiyar J.*: An Ulkudi Payakari by continued residence in the village and cultivation of the same lands for three generations acquired a permanent right of occupancy.

In the case of a Mirasidar to whom an Inam was granted long ago there is no presumption against his having also owned the Kudivaram right at the time of such grant.

A person cannot be held to own the Kudivaram right in its true and complete sense unless he has also the power of alienating his right of occupancy and unless he does not acknowledge himself to be merely the tenant of a person really owning the Kudivaram right.

Per *Spencer J.*:—The word Kudivaram may be used in two senses (1) the right of occupancy (2) the share of the produce which the cultivator whoever he may be, actually gets. It is in the former sense that the word is used in the Estates Land Act S. 8 cl. 2 (d).

Encroachments on Mirasidar's rights took place only in the 19th century and the probabilities are that in 1802, the mirasidar owned also the Kudivaram right.

The terms, Ekabhogam, Tunduvaram Kambatam explained.

Chinnan v. Kondam Naidu (Sadasiva Aiyar & Spencer JJ). 169

Mortgage by Conditional sale—Time specified in the mortage—Redemption—Limitation ... 474

Mortgage—*Construction—Personal covenant—Transfer of Property Act, Ss., 68, 100 Charge—Holder not entitled to sue for sale or for personal decree when no personal covenant—Simple mortgage—Personal covenant, essential.*

Where under a document which called itself a mortgage, plaintiff was put in possession of one item of property and he was given a charge over two

Mortgage—(*Contd*) PAGE

other items with a clause in the end "Whenever we pay the same (money) to you, you shall receive it and give back the deed".

Held; *Per Sadasiva Aiyar J*: That on a proper construction of the document there was no personal covenant in favour of the plaintiff and in the absence of such a covenant the document could be construed only as conferring a usufructuary mortgage interest over one item and a charge over the other two items which would not entitle the plaintiff to sue for the recovery of the money either personally or by sale of the items charged.

Per *Sheshagiri Aiyar J.* (contra). That there was a personal covenant in favour of the plaintiff and that the document was in respect of the other two items a simple mortgage but the suit being on a false allegation of dispossession by the mortgage, it was not a case in which a decree should be given on an altered footing.

Rangappa v. *Tammayappa* (Sadasiva Aiyar, and Seshagiri Aiyar. JJ.) 514

——— Construction—Personal covenant—Essential—Simple mortgage 514

——— *Priority—Suit by first and second mortgagees respectively—Indian Limitation Act*, 1877 *Art.* 120 *and* 182 *of the Second Schedule—Civil Procedure Code of* 1882, *S.* 295.

Where a mortgage had been effected on certain properties, by A in favour of B and a second mortgage on the same properties in favour of C, and again a third mortgage in favour of B, B brought a suit and obtained a decree in respect of his first mortgag and the mortgaged properties were sold and the balance remained in Court deposit after satisfying the decree on the first mortgage, and B obtained a decree in respect of his third mortgage without making the holder of the second mortgage aparty drew the balance money from Court deposit whereupon the holder of the second mortgage brought a suit against the first mortgagee as the holder of the third mortgage for the sum drawn from the Court on the ground of the priority of his mortgage;

Held that the conduct of the first mortgagee who gave no notice to the second mortgagee of the decree and of drawing the money from the Court was fraudulent, that the second mortgagee was entitled to satisfy his mortgage out of the sum so drawn in preference to the first mortgagee as holder of the third mortgage and that the suit for the recovery of the sum, which was a charge on immoveables, was governed by Art. 182 of the Second Schedule of the Indian Limitation Act of 1877 and could be brought within twelve years.

Quaere—If under the circumstances an implied trust did not arise in favour of the plaintiff?

Barhamdeo Prasad v. *Tara Chand* (P. C.) 248

——— *Subrogation—Purchaser pendente lite—Earlier mortgages paid off—Ignorance of mortgage sued upon—Right to subrogation notwithstanding—Presumption of keeping alive—According to interest.*

Where a person paying off a mortgage has a right either to keep the mortgage alive or to extinguish it, in the absence of evidence as to intention, he must be assumed to have acted according to his interest.

Accordingly, the plaintiff, a private purchaser whose sale was held invalid against the purchaser in execution of a decree upon a mortgage, having been effected *pendente lite*, was held entitled to be subrogated to the rights of three prior mortgagees who had been discharged out of the purchase money

Mortgage—(*Contd.*) PAGE.

paid by him, though he was unaware of the subsequent mortgage and had not consequently evinced any intention to keep the earlier mortgages alive.

Subramania Pillai v. *Palaniappa Mudali* (Ayling and Oldfield JJ.) 94

——— *By conditional sale—Redemption—Indian Limitation Act XV of 1877, Sched. II, Art. 148—Period specified in the mortgage deed for redemption-Date from which limitation begins to run.*

Where a person had executed a mortgage by conditional sale redeemable in nine years and it was alleged that at the end of the third year the entire amount of principal and interest was satisfied from the usufruct.

Held that Art. 148, Sched. II of the Limitation Act of 1877 applied and the period of 60 years began to run from the end of the third year when the right to redeem came into existence.

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor.

Musammat Bakhtawar Begam v. *Musammat Husaini Khanam*(P. C.) ... 474

——— *decree—C. P. C. order 34, r. 5—Order absolute—Execution order without—Res judicata in execution proceeding—Order for execution made after notice—Binding in subsequent stages.*

The fact that an order absolute is not made before execution is taken of a mortgage decree is not an objection available to the judgment debtor when an order for execution has already been made after notice to him and the same has not been set aside.

Ramasami Reddi v. *Rangamannar Iyengar.* (Sankaran Nair and Ayling JJ.) ... 255

———Order absolute not passed, objection when not available ... 255

——— *Right to abandon claim against mortgaged property in execution—Dependent on construction of decree—Not entitled, where decree directs property to be exhausted before resorting to other remedies—Limitation Act, art. 182—Step-in-aid of execution—Prayer for bringing in legal representatives of Judgment-debtor—Errors in the matter of reliefs—Effect of—Res-judicata in execution—Essentials of—C. P. C. S. 48—Amendment to save bar of—Substitution of prayer for sale of mortgaged properties for prayer for attachment of other properties.*

Whether it is competent to the mortgagee after decree to abandon his claim against the mortgaged property and proceed against the person or other property of the mortgagor depends entirely upon the construction of the decree *Kamti Ramaji Chidwialla Ramamurthi Pantulu Garu* 8 M. L. T. 355 followed.

Where, accordingly, the decree directed the sale of the mortgaged property and for the balance gave the decree holder right to proceed against the mortgagor personally.

Held that it was not competent for the decree-holder to proceed against the other property of the mortgagor before selling the mortgaged property.

In the circumstances of the case to avoid the bar of S. 48 C,P,C. their Lordships permitted the decreeholder to amend his application for execution by substituting the mortgaged properties for properties sought to be attached,

Mortgage—(*contd.*) . PAGE.

An application for execution containing a prayer to bring in the legal representatives of the judgment-debtor is a step-in-aid of execution sufficient to save limitation though it might contain errors in the matter of reliefs &c. *e.g.*, in that it prayed for attachment of the other properties of the mortgagor before exhausting the mortgaged property.

The principles of *Mahalinga Mooppanar* v. *Kuppanachariar* I. L. R. 30 M. 541, *Kamakshi Pillai* v. *Ramasami Pillai* 18 M. L. J. 14 *Ramien* v. *Khadir Batcha Sahib* 1 L. R. 31 M. 68, *Appaiyar* v *Dharani Moodali* 17 M. L. J. 475, preferred to *Munawar Hussain* v. *Ram Bijai Shankar* I. L. R. 27 A. 619.

An order in execution cannot be given the effect of *res judicata* when there is nothing to show that it was passed after giving the judgment debtors sufficient opportunity to contest it *Ramasami Naick* v. *Ramaswami Chetti* I. L. R. 30 M. 255 at 268 followed.

Varadiah v *Raja Kumara Venkata Perumal* 83

Mortgagor and Mortgagee—*Dispossession of mortgagee in possession—Adverse possession—Against mortgagor—Notice of adverse title necessary.*

Per Full Bench. Where a trespasser takes possession dispossessing the mortgagee his possession may be adverse to the mortgagor but will not become so until the latter has notice of the adverse title set up by him.

Per Sadasiva Aiyar J. In a suit for declaration based on an alleged denial of title, limitation does not commence to run till the plaintiff has notice of the denial.

Ottapurakkal Thazath Suppi v, *Cherichil Pallikal Uppathumma* I. L. R. 38 M. 31 dissented from.

Per Tyabji J. Quaere, if a suit for declaration of title would be barred so long as the title is not extinguished ; *Rajah of Venkatageri* v. *Iskapalli Subbiah* I. L. R. 26 M 410 doubted.

Peria Aiyar Ambalam v. *Shunmugasundaram* (F. B.) 140

Mutwalliship—*Succession—Modes of—Hereditary right—Basis of—Succession from one family—Presumption of hereditary succession as a term of dedication—Waqf for maintenance of founder's family—Claim to hereditary right by founder's family—Less strict proof necessary.*

Under the Mahomedan Law, succession to the office of Mutawalli is regulated in any of the three modes viz., (1) by the terms of the wakfnama or the original dedication (2) by appointment by the last male holder or his executor and (3) by appointment by the Court.

A claim to a hereditary right to the office can only be supported as being in accordance with the actual or presumed direction of the founder at the time of the dedication.

Where there has been a series of appointments of Mutawallis, it is presumed that the appointments have been valid and were made in accordance with the terms of the original dedication.

Where a hereditary claim is set up, the question is not merely whether the succession to the office of Mutawalli has for some time been devolving hereditarily but whether there are sufficient grounds for holding that the original dedication included a provision that the office should so devolve,

The Court will be satisfied with less strict proof where the waqf is for the maintenance of the founder's family or where the claim is set up by his family members than in other cases.

Mutwalliship—(*contd.*) PAGE

Apart from special circumstances the fact that three successive Mutawallis have been from one family is not sufficient to support the inference that it was one of the terms of the original dedication that the office should devolve hereditarily.

Per Sadasiva Aiyar J.—A claim to succeed by hereditary right to a trustee's office or to a religious office or to any other office should be looked upon with strong disfavor by the Courts whether the office was created by a Hindu, Mahomedan, or an adherent of any other creed unless the terms of the original grant, or uniform custom constrains the Courts to decide in favour of its being hereditary.

Phatmabi v. *Haji Abdulla Musa Sait* (Sadasiva Aiyar and Tyabji JJ)... 115

Negotiable Instruments Act, S 22—*Hundi—Provision that no period of grace should be allowed—Validity of Suit brought after the expiry of the period—Limitation—Two plaintiffs—Plaint signed by one plaintiff only—Presentation without authority—Re-presentation after time—Ratification after limitation period—Ineffectual.*

Where a suit was instituted by two plaintiffs but the plaint was signed only by the 2nd who claimed to be the agent of the first and on the plaint being returned on the ground thet the 1st plaintiff had not signed it, it was not re-presented till after the limitation period had expired.

Held there being nothing to show that the 2nd plaintiff was authorised to present the plaint on behalf of the first, the suit was barred.

Held also ; *Per Sadasiva Aiyar J*—The ratification of the 2nd plaintiff's act of presenting the plaint if any, having taken place only after the period of limitation expired it could not be allowed to prejudice the defendants

Per *Sadasiva Aiyar, J.*—Parties cannot contract out of the benefit of the days of grace allowed by section 22 of the Negotiable Instruments Act and as such any contract to the contrary not withstanding a Hundi coming within the section becomes payable only after the expiry of the period of grace and a suit instituted within 3 years thereafter is in time.

Per *Seshagiri Aiyar, J.*—No question of public policy being involved in the giving up of the benefit of the days of grace under S. 22, a contract to that effect will be enforced and in such a case limitation should be reckoned irrespective of the days of grace.

English and American law on the point referred to.

Valliappa Chetti v. *Subramanian Chetty* (Sadasiva Aiyar and Seshagiri Aiyar JJ.) 494

————Days of grace—Whether parties can contract out of—Public Policy. 494

————**S. 43**—*Joint promise—Money paid to some—Consideration for promise by all-Agreement excluding liability of executant of pronote-Admissibility of—Law merchant—Evidence Act S. 92,*

Where several persons make a joint promise in consideration of money paid to some of them the contract is not without consideration with respect to the promise by the others and all are equally liable on the promise.

It is not open to the executant of a promissory note who is liable according to the tenor of the note to prove a contemporaneous (oral) agreement with the promisee excluding liability.

Sesha Aiyar v. *Mangul Dossjee* 20 M.L.J. 144, considered ; *Narasimham* v. *Ramaswami* 24 M.L.J. 91 *followed.*

Sornalinga Mudaliar v. *Pachaiyappa Naiken* 148

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Notice to quit—Lease for 15 years & 6 months thereafter—Notice before 15 years—Ineffective 467

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Partnership—*Dissolution—Suit for share of collection made by one partner—Maintainability of—Limitation for—Defence that plaintiff is not entitled, having regard to state of general account—Admissibility of—practice—Remand for trial in this aspect of case.*

Action is maintainble by a partner for his share of the collections made by another partner although more than three years have elapsed from the date of the dissolution of the partnership provided the action is brought within three years of the collection.

In such an action, it is open to the defendant to show not only that the alleged collections were not made but also that having regard to the state and result of the general account, plaintiff is not entitled to recover.

In the circumstances of the case their Lordships in second appeal, sent the case down for retrial on the footing that the suit wat one for plaintiff's share of the collections thought his aspect of the case was not pointedly insisted upon in the Lower Courts which dealt with it as one for settlement of accounts of the dissolved partership.

China Kondian v. *Narasappa Naidu* (Sadasiva Aiyar and Spencer JJ.) 221

Patni—*Sale for arrears of revenue—Auction purchaser, suit for possession by—BengalTenancy Act VIII of 1885—S 167—Notice of annulment of encumbrances—Service, mode of.*

Where a patnidar committed default in paying the rent to the Zamindar the latter obtained a decree against him and in execution put up the estate for sale by auction subject to a darpatni granted by him. But as no bids approaching the amount due were offered he issued a fresh proclamation for sale with power to avoid all incumbrances under the provisions of the Bengal Tenancy Act of 1885, Sec. 105. The estate was purchased by the respondents They gave notice through the Collector of the district to avoid the darpatni undor Sec. 167. The darpatnidar took no heed of the aforesaid notice ostensibly on the ground that it was not served as required by the Tenancy Act.

Held that the service of the notice through the Collector was in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure of 1882 and therefore notice was properly served in accordance with the requirements of the Bengal Tenancy Act of 1885, Section. 167.

Ananda Gopal v. *Nafar Chandra Pal* (*P. C.*) 86

Penal Code—S. 52—Good faith 621

————S. 215—no application to thief 598

————S. 199—Exception of comment on Judicial Proceeding 621

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Practice—*Administration suit by legatee and annuitant—Discretion of Court—Administration decree not obligatory--on deposit of legacy amount etc action may be dismissed—Creditor's action and legatee's action—No Difference between*

It is not obligatory on the Court to pass an administration decree in a suit by a legatee and annuitant where the (defendant executor) deposits the amount of the legacy and a sum sufficient to secure the payment of the annuity.

Upon the executor depositing the amount, the Court may dismiss the suit making such order as to costs as in its discretion it deems fit.

No distinction can be drawn between suits by creditors and suits by legatees.

Practice of English Courts followed.

Athalur Malagondiah v. *Lakshminarasimhalu Chetty* (White C. J. and Oldfield J) 312

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———Privy Council—Points not before the lower Courts and Privy Council 478

Presidency Small Causes Courts Act, Ss. 38 & 41, Ejectment—Erroneous finding that lease has been terminated, Want of jurisdiction—Interference under S. 115 C. P. C. compulsory 467

Presidency Small Cause Court Rules—*Order 41 r. 2 Ultra vires—Practice or Procedure—Right to apply for new trial, not—Authority to make rules—Extent of—Abridging rights conferred by statutes—If competent.*

Order 41 r. 2 of the Presidency Small Causes Courts Rules which requires an applicant for new trial to either deposit the decree amount or furnish security is *ultra vires*,

Per *Chief Justice* :—The authority of the High Court to make rules regulating the practice and procedure of the Small Cause Courts does not extend to abridging the right to apply for new trial conferred by the statute which is a substantive right and not a mere matter of practice or procedure.

Where a power to make regulation is given by a statute the general rule is that no regulations made under the statute can abridge a right conferred by the statute itself but if the rules are within the power expressly conferred, they would be good even if they purported to abridge the rights given by the statute

Madurai Pillai v. *Muthu Chetty* (*F. B.*) 220

Presumption of law-erroneous—Finding of fact based on—effect of... 385

Principal and Agent-Power of Attorney—General Powers-construction. 185

Privy Council decree—*Execution of—Power of executing Court—Recognition of transferee of decree by, if competent—Order 45 r. 15 and 16—Power of Attorney—Construction—Principal and Agent—General power to manage Zamindari—Power to transfer decree in favour of estate,*

The Court of the first instance to which a decree of the Privy Council is transmitted by the High Court for execution has power to recognise transfer

Privy Council decree—(*contd.*) PAGE.
of the decree and permit the transferee to execute without directions from the High Court in that behalf.

General power to manage a Zamindari "in all respects as fully and absolutely as the principal himself is empowered to do" must be held to include the power to transfer for a reasonable consideration a decree amount due to the estate.

Palaniappa Chettiar v. *Arunachala Chettiar* 23 M. L. J. 595 distinguished.

Lingam Krishna Bhupathi v. *Raja of Vizianagaram* (Sadasiva Aiyar and Spencer, JJ) 185

Probate and Administration Act—Inventory, Essentials of 56

Professional misconduct—Vakil—suggestion that he is in a position to influence judge—Suspension 429

Promissory note—*For the benefit of two members of a Hindu family—Payee dying—Suit by the other member or by all the surviving members—Maintainability of*

Where a promissory note stands in the name of one of the members of a joint Hindu Family who dies leaving a widow and it is found that the note was not taken for the benefit of the family but was taken only for the benefit of the deceased and the 1st plaintiff one other member of the family,

Held that neither the 1st plaintiff nor all the surviving members could maintain the suit upon it.

Gopala Aiyangar v *Venkatakrishna Aiyangar* (Sankaran Nair and Ayling JJ) ... 221

———*Intention that two should jointly execute—Failure of one to—Not enforceable against the other—Forgery of signature of a joint executant—Material alteration—Effect of.*

Where it was intended that two persons should jointly execute a promissory note and should become jointly liable and one of them does not execute, the note is not enforceable as against the other.

Where a note purports to be executed by two persons and it is found that the signature of one of them is a forgery, the whole note is bad and enforceable against neither.

Amirtham Pillai, v. *Nanjah Gownden* (Sadasiva Aiyar J) 257

———material alteration, forgery of the signature of one of the executants, effect of 257

———*Varthamanam—Construction—Loan and promissory note, parts of the same transaction—Action not maintainable apart from note—Note inadmissible for want of proper stamp—Evidence Act, S. 91.*

Where a loan and a promissory note are parts of the same transaction, action is not maintainable for the amount advanced apart from the promissory note and where the promissory note is inadmissible for want of proper stamp, the lender has no remedy.

Defendant gave a varthamanam or letter to the plaintiff which ran in these terms.—"Amount of cash borrowed of you by me is Rs. 350 I shall in two week's time returning the sum of Rupees Three Hundred and fifty with interest thereon at the rate of one Rupee per cent. per month get back this letter." *Held*: that it was a promissory note and not merely an offer to borrow or an acknowledgment of indebtedness and had to be stamped accordingly.

Promissory Note—(*contd*). PAGE.

Muthu Sastrigal v *Visvanatha Pandhara Sannadhi* (Sadasiva Aiyar and Spencer JJ.) 19

Provincial Small Cause Courts Act, S. 28—*Suit for rent—Denial of plaintiff's right to Kudivaram and consequently right to sue in Civil Courts—Denial of plaintiff's right as trustees.*

In a suit for rent by the trustees of a temple, defendants denied the title of the plaintiff's to sue as trustees

Held: that being a question which the Small Cause Court could not finally determine, the Cou t could appropriately return the plaint under S. 23 of the Provincial Small Cause Courts Act.

Semble: The Court could also return the plaint under that section when the defendants contend that the temple did not own the Kudivaram and that the suit could be brought only in the Revenue Court.

Muthiah Chettiar v. *Authinamulagi* (Sadasiva Aiyar and Tyabji JJ.) 225

Public policy—Monopoly in Purohitam Office—Not to be recognised by Civil Courts ... 482

Purohitam—Office—*Not recognised by law—Monopoly to officiate as priest—Against public policy—Immoveable property—Offices attached to temple.*

Purohitam office is not one which will or should be recognised by Civil Courts *Ramkrishna* v. *Ranga* (7 M. 424) followed.

Per Sadasiva Aiyar J: It is against public policy to recognise a monopoly of the right to officiate as a priest which is a legitimate calling for all Brahmins. Offices attached to temples stand on a different footing.

Per Seshagiri Aiyar J. Purohitam is not immoveable property so as to be capable of being leased out. 482

Saripaka China Mahadeva Vasulu v *Muthura Suryaprakasam* (Sadasiva Aiyar and Seshagiri Aiyar JJ.)

Purohitam Office—Not immoveable property—Not capable of being leased out ... 482

Rateable distribution—Attachment by different Courts-Amount realised by the highest Court—Right to 405

Reciprocal promises, essentials, when contract at an end 831

Redemption—Mortgage by conditional sale—Time specified in the mortgage—When limitation begins to run 474

Registration Act, S.49—*Immoveable property—Evidence of transaction affecting—Registered sale deed—Contemporaneous unregistered letter—Admissibility of—As evidence that mortgage was intended—Or as evidence that no title passed.*

Held: an unregistered letter cannot be used to show that a registered sale deed did not convey the absolute interest but was intended to operate only as a mortgage.

Held further that it is inadmissible also for the purpose of showing that the sale conveyed no title to the defendant the intention of the parties being that it should operate as a mortgage and not otherwise. To use it for that purpose would be to use it as evidence of a transaction affecting immoveable property

Pydah Venkatachalapathi v. *Muthu Venkatachalapathi* (*F. B.*) 151

———**S. 77**—refusal to register, order returning document 307

Registration Act—(*Contd.*) PAGE

———S. 77, suit under last day holiday, presentation on the next office day. ... 307

Relationship—Proof of—Discrepancies in oral evidence—Court's duty ... 442

Religious Office, Archaka, Disqualification to hold, Alienation 315

———Judgment by consent, not binding on the public 315

———Succession to, intention of founder, criterion for determining 315

Rent—Reduction of, by unregistered deed—Abatement of rent 25

Rent Recovery Act, S 39—*Sale for arrears of rent—Suit to set aside Purchaser alone necessary party—Melwaramdar or receiver in suit of Melwarmdars—Limitation Act, (Act IX of 1908) Addition of proper but not necessary party—Effect of.*

To a suit brought to set aside a rent sale the only necessary party is the purchaser and the suit is not liable to be dismissed on the ground that when the landlord is made party more than one year has elapsed from the date of sale.

Distinction between necessary party and proper party pointed out.

Annamalai Velan v. *Murugappa Velan* (Sadasiva Aiyar & Spencer JJ.) 288

Res judicata in execution proceedings, order for execution made after notice—Binding nature 255

Revision—Acquittal by trick of accused—Incompetency 160

Right of Suit—Third party to contract ... 127

Second Appeal—finding of fact based on erroneous presumption of law—effect of 385

Specific Performance—*Contract to sell land-Bonafide purchaser for value without notice—Burden of proof on purchaser—Hindu law—Death of contracting party—Sons brought in as representatives—Right to impeach contract.*

In a suit for specific performance of a contract for the sale of immoveable property, it is not for the plaintiff to show that a subsequent purchaser had notice of the contract but it lies on the latter to make out that he is a bonafide purchaser for value without notice.

If, before decree, the persons that entered into the contract (being Hindus) die leaving sons behind who are brought on record as legal representatives it is open to the latter to show that the contract is not binding on them as sons.

Tiruvenkatachariar v. *Venkatachariar* (Sadasiva Aiyar Tyabji JJ) 218

———*Specific Relief Act S, 23—Delay—Not a ground for refusing—Waiver or abandonment, mere delay not—Contract to pay after execution of sale deed by defendant—No breach or laches till execution of sale deed.*

Delay by itself is not a ground for refusing to decree a suit for specific performance *Nawab Begam* v. *A. H Creet* I. L. R. 22 All 678 distinguished.

It is an error of law to hold that mere delay apart from other facts or circumstances amounts to waiver or abandonment.

Where under a contract for sale the defendant agreed to execute sale deed in favour of the plaintiff within a month and then receive the purchase money.

Held that there could be no question of breach of contract or laches on the part of the plaintiff till the defendant executes the sale deed.

Specific Performance—(*contd*). PAGE.

Suryaprakasarayudu v. *Lakshminarasimha* (Sadasiva Aiyar and Seshagiri Aiyar JJ) ... 518

————Specific Relief Act. I of 1877, S. 22—Delay—No ground for refusing—In the absence of waiver or abandonment,—error of law 518

Specific Relief Act, S. 45—*Mandamus—Act or forbearance and person to be clearly stated—Madras Municipal Act, Ss, 33, 52, Rules under S. 413—Objection to qualification for election as Commissioner—Revision before Presidency Magistrate Decision upholding objection—Name not directed to be removed—Application for continuance of name on the list Mandamus—Consideration of irrelevant matters—not acting outside Office Remedy under Criminal Procedure Code.*

An application under S. 45 of the Specific Relief Act should clearly state the act or forbearance to be directed and the individual against whom the order should be made

Where, on objection taken to the inclusion of the applicant's name in the list of candidates qualified for election as Municipal Commissioners, the Presidency Magistrate before whom the matter went on revision from the order of the President, merely decided that the applicant was not qualified for election but no direction was given either by the Magistrate or by the President to remove his name from the list.

Held: that an application under the section for an order that his name should continue on the list could not be granted.

If the Magistrate considers irrelevant matter that is not acting outside his office and his order must be sought to be reviewed under the Criminal Procedure Code.

Vijiaragavalu, In re (Bakewell J) 310

————I of 1877, S. 45—Mandamus 310

Subrogation—*Nominal sale—Purchaser not in possession—Paying off mortgage decree—Not entitled to—Principles on which subrogation to be allowed.*

Where a transferee under a nominal sale effected with a view to defraud creditors, not in possession, paid off a decree on a mortgage of the property, *Held* that he was not entitled to be subrogated to the rights of the mortgagee as against a purchaser in execution of a decree against the transferor.

Per *Tyabji J.* Principles on which subrogation is to be allowed, discussed.

Karuppan Ambalagaram v. *Sakuth Levvai* (Ayling and Tyabji JJ) 76

Subrogation—mortgage—Purchaser *pendente lite*—Right to 91

Succession—mutawalli modes of 115

Succession Act (X of 1865) S. 277—Innentory essentials of 56

Succession certificate—*Question whether debts due to the deceased—Not open in application for.*

The question whether the debts belonged to the deceased is not a matter that can be gone into on an application for succession certificate.

Bai Kashi v. *Parbhu Keval* (28 B. 119) followed.

Radha Rani Dasi v. *Brindabun Chandra* (25 C. 920) dissented from.

Srinivasachariar v. *Ramasami Aiyangar* (Sankaran Nair and Ayling JJ) ... 365

Suits Valuation Act, *S. 8—Court Fees Act, S. 7, Cl 9—Valuation for jurisdiction—Same as for Court fees.*

Suits Valutaion Act—(*Contd*) PAGE

Having regard to S. 8 of the Suits Valuation Act, valuation of a suit falling within Cl. (xi) of S. 7 of the Court Fees act is the same for purposes of jurisdiction as for Court fees.

Vannavalli Seshagiri Row v. *Narayanaswami Naidu* (Ayling J.) 573

Tender—Ineffectual, if of less amount 25

Third party—right of suit, in contract 127

Transfer of Property Act, S. 52—*Lis Pendens—C. P. C., O. 21, R. 63—Suit under—Only continuation of claim proceeding—Purchaser after order—Alience pendente lite—Not necessary party to suit—Limitation Act. S 22—Addition of after limitation time—Suit not barred, if suit against claimant in time.*

Suits under O. 21, R. 63 being only a continuation of the claim proceedings, a purchaser from the claimant after the date of the order and before suit must be deemed an alienee *pendente lite* like a purchaser after decree and before appeal, who takes his alienation subject to the result of the suit against the claimant, under S. 52 of the Transfer of Property Act.

S. 22 of the Limitation Act has no application where the party added is not a necessary party.

Where a suit was instituted against the claimant in time but when the purchaser brought himself on record, more than a year had elapsed from the date of the order.

Held that as he was only an alienee *pendente lite* he was not a necessary party and the suit was in time.

Krishnappa Chetty v. *Abdul Khader Saheb* (Sadasiva Aiyar and Spencer JJ.) 449

———**S. 53**—*Creditors, if includes future creditors—Mortgage during minority—Misrepresentation as to age—No duty to refund in the absence of—Settlement by father—Estoppel by attesting transfer of mortgage, by Father—Effect of—No debt for which the son would be liable—Hindu Law.*

Suit on a mortgage executed by the 1st defendant during minority in favour of the third who transferred it to the 4th who again transferred it to the plaintiff. the Transfer by the third defendant to the 4th was attested by the 1st after he attained majority. Before the date of attestation but after he attained majority 1st defendant executed a statement transferring all his property to his mother and wife on behalf of his minor son stipulating only for maintenance to himself. The finding was that the settlement was intended to be operative but that it was executed by the 1st defendant to defeat and delay creditors.

Held that in the absence of a finding that the 1st defendant had obtained money by misrepresenting his age, there was no duty cast on him of refunding the money advanced and as such the plaintiff was not at the date of the settlement a creditor of the 1st defendant.

Held also *Per Wallis J.* in the absence of a finding that the settlement was intended to defraud subsequent creditors as distinguished from creditors at the date of the settlement and the plaintiff not being a creditor standing in the shoes of a creditor at the date of the settlement, he would not be entitled to avoid it.

Quaere, even if he stood in the shoes of such creditor he would be entitled to avoid.

Transfer of Property Act—(*contd*). PAGE.

Difference between the statute of Elizabeth and S. 53 T. P. A. pointed out.

Per Sadasiva Aiyar J: Estoppel only prevents a man from pleading the real state of facts and does not make the false state of facts which the Court has got to assume between the parties to become for all purposes the true state of facts and so far as the 2nd defendant the son was concerned, no such debt as he was bound to discharge under the Hindu Law, arose at any time even after the settlement by reason of his father being estopped.

Vaikuttam Pillai v. *Athimoolam Chettiar* (Wallis and Sadasiva Aiyar JJ) 612

———**IV of 1882, S. 52, C. P. C., O. 21, R. 63**—Suit under—Only a continuation of the claim proceeding 449

———**S. 53**—Alienation in fraud of creditors—Transfer for consideration—Want of good faith 478

———**Ss. 58 (b) (c), 98**—*Mortgage—Construction—Simple mortgage—Usufructuary mortgage—Mortgage by conditional sale—Combinations of—Anomalous mortgage—Hindu forms of mortgage by conditional sale—Effect of under the Act—Personal covenant—Covenant clogging equity of of redemption.*

A mortgage which was described in the deed itself as an usufructuary mortgage contained a clause that if the mortgage amount was not paid on the stipulated date, the mortgage was to work itself out as a sale for the principal amount of the mortgage. In addition, there was a covenant at the end to the effect that the mortgagor should pay the costs of the constructions of earth work etc, effected on the land along with the mortgage money. Possession was given to the mortgagee.

Held Per *Sadasiva Aiyar J.* That the mortgage was a combination of a simple and usufructuary mortgage with a covenant clogging the equity of redemption and that it was redeemable.

Per *Spencer J.* that it was either usufructuary mortgage with a covenant clogging the equity of redemption or a combination of an usufructuary mortgage with a mortgage by conditional sale in either of which cases it was redeemable.

Held. Per *Curiam*. The combination of a simple mortgage and an usufructuary mortgage or of the latter and a mortgage by conditional sale is not an anomalous mortgage under S. 98, Transfer of Property Act.

Amarchand v. *Kilamorar* dissented from.

Per *Sadasiva Aiyar, J.* Hindu forms of mortgages by conditional sale are not treated as such by the Act. They are either simple mortgages, or usufructuary mortgages or combination of both with a covenant in addition to clogging to the equity of redemption.

Held Per *Spencer J.* On a proper construction of the document, a personal covenant to pay the mortgage amount could not be inferred ... 47

Srinivasa Aiyangar v. *Radhakrishna Pillai*. (Sadasiva Aiyar and Spencer JJ.) ... 47

———Ss. 68, 100—Simple mortgage or charge—Charge holder not entitled to sue for sale or personally when no personal covenant 514

———IV of 1882, S. 108 (*i*), Lease of uncertain duration, emblements Paddy plants 818

Undue Influence—Low price—No ground for inferring that contract is vitiated by ... 815

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Vakil—Professional misconduct 129

Water course—*Beds of natural streams in Malabar—Non-tidal and non-navigable—Ownership of, vests in adjoining proprietors and not in Crown—Suit for declaration of easement right against Government—Non-joinder of adjoining proprietors—Objection not taken in time—25 years' construction of dam—Proof of easement—Finding of fact based on erroneous presumption of law—Effect of—Second Appeal—Custom in Palghat.*

Per Sankaran Nair, J—In Malabar, the law as to ownership in beds of natural streams is the English law *viz.*, that beds of natural streams not being tidal and navigable vest in the adjoining proprietors and not in the Crown.

Alleged custom to the contrary in the Palghat Taluk referred to but no opinion expressed as to its validity.

In a suit for declaration against the Secretary of State that the plaintiff was entitled to construct a dam, the Crown having failed to prove that it was the owner of the bed and the construction of the dam for over 25 years being found.

Held, per Sankaran Nair, J.—That the plaintiff was entitled to a declaration of her right to construct the dam against the Crown and the objection that the adjoining proprietors were not parties not having been taken earlier, was no reason for not giving her the relief.

Per Sadasiva Aiyar, J.:—Plaintiff not having made out her right of easement as against the adjoining proprietors and the said proprietors not being before the court, declaration prayed for could not be granted.

Government ownership in public footpaths and in beds of natural streams is not inconsistent with the general theory of private ownership of lands in Malabar.

His Lordship felt inclined to hold the view that *prima facie* they vest in the Crown, but did not express a final opinion.

A finding of fact though based partly on an erroneous presumption of law cannot be interfered with unless the finding is materially vitiated by the error.

Meenakshi Amma v. *Secretary of State for India.* (Sankaran Nair and Sadasiva Aiyar JJ) ... 885

———Beds of natural and streams in Malabar—Non-tidal and non-navigable rivers—Ownership of 885

Will by a Hindu—*Construction—Hindu's son by a Mahomedan woman—Word "aulad" in the will—Marriage of issue with Hindu woman of Chhattri caste—Treatment by testator of legatees as Hindu, and marriages with Hindu as lawful—Effect of—Gift of a fund to "children" in India—May include "illegitimate issue.*

Where a Hindu, Janwar Chhattri by caste, had a son by a Mahomedan woman, whom he brought up as Hindu and got married to two Chattri women one after the other by whom he had children and made a will to the effect that the income from certain properties should go to the support of the "aulad" of his son "from generation to generation as long as his family (Khandan) was in existence."

Will by a Hindu—(*Contd.*) PAGE.

Held, having regard to the fact that the testator treated his son as a Hindu in religion and desired that others should so treat him, that he treated his marriages with the two Chattri ladies as lawful marriages and desired that others should so treat them he must be takeun have resolved to regard and treat and treat the offspring of these unions as legitimate and to have desired that they should be so treated and regarded by others and in the circumstances, the proper construction of the will was to hold that by "aulad" (legitimate issue), the testatator meant only the issue of the son by a Mahomedan concubine.

Where a gift is made by will of the corpus of a fund or a life interest in the fund to the children of the testator or of another as a class, there may be good reason in some such cases for holding that in India, the word children includes illegitimate children.

Sher Bahadur Singh v. *Ganga Bakhsh Singh* (*P. C.*) 291

Will, construction, "aulad," Issue by a Hindu and a Mahomedan woman 291

———*Made by Hindu—Construction--Self-cquired property Costs Hindu Wills Act of* 1870 *Ch.* 21—*Intention of testator*.

Where a Hindu had made a will in respect of his two sons in respect of his self acquired property, and had said in the Will--Should either of these two sons die without having had (leaving) any male issue, the survivor ......is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue after undertaking (to defray) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters".

Held that the testator had clearly in view the survival of the testator by his two sons and the death of one of the sons leaving a widow and daughters but no male issue and therefore the appellant as such surviving son was entitled to the estate conveyed by the will and that the correlative obligations resting upon him came into play for which he must give security to the High Court. ...

Held, further that in the construction of Wills there was nothing specifically either English or Indian in the idea that the Will of the testator must be construed on that principle which would enable Courts of Law most fully to give effect to the intention expressed by his words .... and that in ordinary circumstances ordinary words must bear their ordinary construction and the whole Will, that is, the whole of the words employed by the testator must be looked at together so as to determine his whole intention.

Held also that in view of the special difficulties in the construction of the Will the costs to be paid by the appellant throughout.

O'Mhoney v. *Burdth* 7 English and Irish Appeals 388 which corrects the case of *Edwards* v. *Edwards* 15 Beav. 357 and is supported by *Allen* v. *Frthing* in *Jarman on Wills* 6th Ed. 2160) approved.

Chunilal Parvatishankar v. *Bai Samarth* (*P. C.*) 617

Will—attestation of, by dependents 153

Words—Mokhasa—Inam—meaning of 169

———Shrotriem 169

———'Aulad' 291

NOTES OF RECENT CASES.

PRIVY COUNCIL

Present:—Lords Atkinson and Moulton and Mr. Ameer Ali.

Sheiks Leakat and others — *Petitioners.*

v.

The King-Emperor — *Respondent.*

Indian Penal Code, Sec. 147—Special leave to appeal—Bail granted by the High Courts—Question as to evidence.

This was a petition for leave to appeal to His Majesty in Council against the findings of the High Court at Calcutta, partly confirming the sentence passed on the petitioners by the Sessions Judge of Purnea, dated April 14, 1913.

The prosecution alleged that an outrage was committed on a Muhammedan woman in the neighbourhood of Roshanganj. The Mohammedans of Sheikpura and Hamathpur, vowing revenge on one Tirthanand, held meetings at various places and decided to attack Tirthanand's house. The day fixed for such an attack was the Siriva day when all the people of the neighbouring villages had a right to fish in a certain Jalkar. The petitioners and others attacked the house, while the brother of Tirthanand fired a cartridge into the air killing one Aulad and wounding several others. Persons including the petitioners, who were supposed to be responsible for the riot were arrested and committed to the Sessions.

The defence was that the story of the outrage was concocted. The real motive for the murdering one and wounding several others was to stop the general right to fish on a certain day in the Jalkar Aulad was not killed in the house, nor was the shot fired into the air, but they were shot at while fishing.

Mr. Killy, the District Magistrate, paid a visit to the house and found no mark of stray shots in the wall or in the ground. The police officer stated that he found no blood stains or shot marks at that place.

The Sessions Judge found that the story of an outrage on a Mohammedan woman was false and that the real reason for the riot was a dispute as to the rights in the Jalkar. He however convicted and sentenced the petitioners and others to various terms of imprisonment.

On appeal to the High Court one Nassait was released while the sentence against the rest was confirmed.

As the petitioners wished to appeal to His Majesty, bail was granted pending an application to His Majesty in Council.

O'Gorman, for the petitioners, stated that the motive alleged by the prosecution was wholly false inasmuch as the complainant

*8th December 1918.

himself admitted that his enquiries satisfied him that no outrage on a Mohammedan woman was committed. The evidence did not warrant the conviction and the sentences passed were against the weight of evidence.

Rejected.

Solicitors for petitioners :— *W. W. Box and Co.*

PRIVY COUNCIL.

Present :—Lords Atkinson and Moulton and Mr. Ameer Ali.

Saikhum Indra Singh *Petitioner.*

v.

Cachar Land and Loan Corporation Ltd. *Respondents.*

Petition for special leave to appeal

Confiscation by Government of India—Sale of properties so confiscated—Act of State outside Civil Court jurisdiction.

This was a petition for special leave to appeal from the judgment of the High Court at Calcutta.

In 1891 a rebellion took place in the Manipur state the result of which was that the Maharaja Kula Chandra Singh was deposed and the chiefship confused on Charn Chandra Singh with Major Maxwell a British officer as administrator of the said state during the minority of the Raja. In 1895 Major Maxwell with the approval of the Government of India sold certain properties by public auction which the petitioner claimed under a deed of gift by the brother of deposed Raja who claimed ownership therein on the ground that the property was private and not belonging to the state. A suit was brought against the Respondent Co., which had bought the properties in question, in the Court of the District Judge of Cachar in 1903. It was decided against him on the ground that the sale by auction was an Act of state and therefore outside the jurisdiction of the Civil Court. On appeal to the High Court it was held that it was not an Act of state, but that there was no sufficient proof that the property claimed was private The appeal was accordingly dismissed. As the value of the property was less than the minimum amount required for appeal and the judgment one of affirmance, the petitioner was directed to apply to the Privy Council.

Lowndes for the petitioner contended that the case involved a substantial question of law of general importance *viz.*, what constituted an act of state and whether the sale in question was an act of state which could not be questioned in the Civil Courts.

Rejected.

Solicitors for petitioner :—*Dower and Johnson.*

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*6th December 1918.

NOTES OF RECENT CASES.

PRIVY COUNCIL.

Present:—Lords Shaw and Moulton and Mr. Ameer Ali.

Ratansi Dharamsey Morarjee *Petitioner*.

v.

Sir Narayan Ganesh Chandavarkar and others. *Respondents*.

Petition for special leave to appeal from the High Court at Bombay.

Hindu Law—Will—Probate and Administration Act of 1881 *Sec. 37—Right of a Co-parcener—Probate duty—Court Fees Act of 1870 Schedule 1 art. 11.*

This was an exparte petition for special leave to appeal to His Majesty in Council.

The facts of the case were that one Goculdas, a merchant of Bombay, died leaving considerable property, both moveable and immoveable, making a will, creating several benefactions, and appointing the respondents as executors. The petitioner who was the eldest son of the deceased applied to the High Court for a grant of the letters of administration to him under Sec. 37 of the Probate and Administration Act of 1881, for the property to which he was entitled as a co-parcener and which could not be affected by the will of the deceased. On notice being given to the executors, none appeared willing to prove the will. The effect of the petition being granted would have been to exempt the petitioner from the payment of Probate Duty in the form of Court Fees under Schedule 1—11 of the Court Fees Act 1870 in accordance with the practice of the High Courts at Calcutta and Bombay. The petition was however refused on the ground that the grant of letters of administration in the form applied would involve the determination of the point that the will was inoperative which the Court had no power to do. On appeal this was confirmed. The petition for leave to appeal to His Majesty was refused by the High Court on the ground that no substantial question of law was involved in as much as the Courts had exercised their discretion under the Section quoted above.

* 10th December 1913.

Sir Alfred Cripps K. C. (with him *Lowndes*) on behalf of the petitioner contended that the judge in the first Court wholly misconceived the object of petitioner's application who, had applied for the grant of administration in respect of those properties only which were joint. The question involved was one of general interest and of wide-reaching importance to all Hindu families in India, there being in the Probate and Administration Act 1881 by which they were governed no other provision than Sec. 37 under which representation could be taken out to a deceased co-parcener in respect of joint family property standing in his name.

Rejected.

Solicitors for petitioner :—*T. L. Wilson and Co.*

Present:—Lords Shaw and Moulton, and Mr. Ameer Ali.

Sorabji Hormusji Batlivalla *Petitioner.*

v.

Jamshedji Merwanji Wadia *Respondent.*

Petition for special leave to Appeal from the High Court at Bombay.

Special leave to Appeal—Damages—Negligently driving a friend in a motor car.

This was an *exparte* petition for special leave to Appeal.

The facts were that the petitioner and the respondent arranged to make an excursion to a certain place. The respondent took his seat on the invitation of the petitioner's wife, in his car, while the respondent's car was occupied by others of the party. After driving a few miles the car had to cross a level crossing, during which petitioner's wife being afraid that a train was in sight gave warning to that effect. The petitioner losing his head, being of a nervous disposition, the car ran down a slope and stopped in the paddy field beyond. As the result of this accident a child was killed and the respondent was injured. He brought an action against the petitioner on the grounds that the petitioner was negligent in driving the car when he was incompetent to do so, when it was overloaded and at an excessive speed, and claimed damages for personal injuries. The Court of first instance awarded damages to the extent of Rs. 38,000 which on appeal was reduced to Rs. 36,000 in other respects the judgment of the Court of first instance being confirmed.

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* 10th December 1913.

Sir R. Finlay K. C. M. P. (with him *Page*) on behalf of the petitioner contended that the case involved a substantial question of law inasmuch as the position of the petitioner was that of a bare licensee and the driving was gratuitous. In *Moffall* v. *Bateman*[1] Lord Chelmsford observed that a person offering another a seat in a carriage which he was driving, was liable only when the negligence on his part was of a gross description. In *Indermaur* v. *Dames*[2] Mr. Justice *Willes* stated that "there is a considerable resemblance though not a strict analogy, between the class of cases (i. e. those relating to bare licenses) and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver for damages sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver." The learned judge in *Gantret* v. *Egerton*[3] added that " there must be something like fraud on the part of the giver before he can be made answerable." The Courts have erred both in respect of the principles of law laid down by them and also in respect of the conclusions of fact upon which their judgments are based.

Rejected.

Solicitors for petitioner :—*T. L. Wilson and Co.*

Full Bench
Chief Justice
Sankaran Nair J.
Oldfield J.
1914, *January* 15

S. A. No. 1972 of 1911.

Art. 131 Limitation Act—Periodically recurring right—Arrears.

Art. 131 of the Limitation Act applies to a case of a periodically recurring right where the suit is for a mere declaration and also where the suit is for a declaration and recovery of arrears.

T. R. Krishnasami Iyer for Appellant.

J. L. Rosario for Respondent

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1. (1869) L. R 3 P. C. 115 at 121.
2. (1886) L. R. 1 C. P. 286.
3. (1867) L. R. 2 C. P. 371 at 375,

Ayling J.
Sadasiva Aiyar J.
1914, *January* 15.

C. M. A. No. 38 & 146 of 1913.

Limitation Act art 120—Suit for declaration—Starting point, denial of title—Not date of Revenue authorities refusing to alter patta.

The starting point for limitation in a suit for a declaration of title is the date on which the defendant denied the title and not the date on which the Revenue authorities acting upon the denial, refuse to alter the patta in the name of the plaintiff *Anantarazu* v. *Narayanarazu*[1] dissented from.

B. Sitarama Row for Appellant.

K. Ramanatha Shenoi and *K. Sundara Row* for Respondent.

Ayling J.
Sadasiva Aiyar J.
1914, *January* 16.

C. M. A. No. 230 of 1911.

C. P. C. (Act XIV of 1882) S. 375—Compromise decree—Validity of—Objection to—Contract Act Ss. 38 and 39.

1. In compromise decrees matters other than those relating to the subject matter of the suit may be incorporated in the decree and they are not only not invalid but can be enforced in execution ; they form the consideration for other terms of the compromise. Objection must be by way of appeal to the incorporation and not in execution.

2. Offer must be unconditional. Mere offer by post to perform is not equivalent to performance.

3. Promisee must have been given opportunity to see whether the proposed performance is according to what was agreed to be performed.

Where the promisor has disabled himself from performing his part of the contract the promisee can put an end to the contract.

K. Ramachandra Aiyar for Appellant.

K. Srinivasa Aiyangar and *S. Muthiah Mudaliar* for Respondents.

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1. (1911) 22 M. L. J. 108.

NOTES OF RECENT CASES.

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PRIVY COUNCIL.

Present:—Lords Chancellor, Moulton, Parker of Waddington and Sumner.

Clifford and others *Petitioners.**

v.

The King-Emperor *Respondent.*

Petition for special leave to appeal from the Chief Court of Lower Burma.

Criminal matters—Special leave to appeal—Dillet's case (12 *App. cases* 459).

The Judicial Committee is not a court of Criminal appeal and therefore cannot go into the questions of evidence and of procedure; but it is empowered to interfere only when it finds "that what has been done has been grossly contrary to the forms of justice or violates fundamental principles" as laid down in Dillet's case.

This was a petition for special leave to appeal. Sir *R. Finlay* K. C. with him *Coltman* appeared for the petitioners who were directors and manager of the Bank of Burma under Indian Companie's Act 1882. In 1911 the securities of the Bank fell heavily and on refusal of the Bank of Bengal to help them they decided to go into liquidation. A half-yearly balance sheet was issued which was alleged to have induced certain persons to invest certain sums of money. The official liquidator lodged a complaint against the petitioners who were prosecuted under Chapter 18 of the Code of Criminal Procedure and committed to the Sessions on the charge of Criminal breach of trust. They were convicted and the conviction was confirmed by the appellate court. There were many questions as to misdirection of the Jury and improper admission of evidence which the judge was asked to reserve for the consideration of the Bench of the Chief Court which he refused. The charge was amended which was bad in law and the jury was an open one. Facts were admitted of which the accused had no sufficient notice. The Judge repeatedly expressed his opinions which most likely influenced the jury. Sentence is in contravention of Section 71 of I. P. Code which was a substantial question of law.

*17th November 1913,

The judgment of their Lordships was delivered by

Lord Chancellor :—Their Lordships do not propose in this case to recommend that leave to appeal be given. Their functions are not to sit as a Court of Criminal Appeal and it would be contrary to their constitutional duty to assume that position. A Court of Criminal Appeal can go into questions of evidence and into questions of procedure, and can deal with the case on the same footing as an ordinary Court of Appeal. Their Lordships' functions on the other hand are limited by the principle laid down in Dillett's Case (12 App. Cases 459) to something much more narrow, namely, this: that if they find that what has been done has been grossly contrary to the forms of justice, or violates fundamental principles, then they have power to interfere. But in the present case they think there was evidence to go to the jury on all the matters which have been dealt with, and it would be contrary to their duty to express any opinion as to whether in that state of things the verdict found by the jury was a right one, or the summing up a perfect one. As regards the sentences, it is obvious that the question is one of form only. The learned Judge has given three periods of eight months in one case and three periods of six months in another, taking each offence as a separate offence. Technically, their Lordships think that these were separate offences, and moreover it would have been possible to give a longer term upon any one or the whole of the charges in question. The analogy between this case and other cases which constantly occur in criminal jurisprudence is a perfect one, and their Lordships see no difficulty in treating these as separate offences. Their Lordships will humbly advise His Majesty that the Petition ought to be dismissed.

Solicitors for petitioners :—*Arnold and Son.*

Full Bench
Chief Justice
Sankaran Nair J.
Oldfield J.
1914, *January* 5.

C. R. P. No. 952 of 1912.

Presidency Small Causes Courts Act—Rules framed by High Court—Rule not relating to practice and procedure—rule requiring deposit of decree amount before application to Full Bench—Ultra vires.

The power conferred on the High Court by S. 9 of the Presidency Small Cause Courts Act is confined to the framing of rules regulating the practice and procedure of the Small Cause Courts. A rule

which imposes the condition that the decree amount and costs should be deposited before an application to the Full Bench can be entertained is not a rule of practice and procedure as it restricts the right given to the party by S 38 of the Act and is therefore ultra vires.

C. Krishnamachari and *K. Bashyam* for petitioners.

P. M. Sivagnana Mudaliyar for Respondent.

Chief Justice *Sankaran Nair* J. *Oldfield* J. 1914, *January* 6.	L. P. No. 228 of 1912.

Sections 17 and 49 of the Registration Act—Sale—Unregistered letter to prove sale to be mortgage.

An unregistered letter written by a vendee of immoveable property contemporaneously with the document of sale, agreeing that the sale should be only a mortgage and not a sale is inadmissible in evidence in a suit brought by the vendor for recovering possession from the vendee.

T. Rangachariar for appellant.

R. Narayanamurthy for respondent.

Ayling J. *Tyabji* J. 1914, *January* 21.	S. A. Nos. 2073 to 2076 of 1912.

Water-cess—Double rate for twice the water taken—Madras Act VII of 1865.

A land holder whose wet lands were entitled to Government water through only one sluice is liable to pay double water-rate if his lands get water through two sluices even in the absence of proof that he was responsible for the opening of the second sluice.

C. V. Anantakrishna Aiyar for appellant.

Government Pleader for respondent.

Ayling J. *Sadasiva Aiyar* J. 1914, *January* 22.	C. M. A. No. 61 of 1913.

C.P.C. Ss 37,150—Jurisdiction—Court which passed the decree—Court which passed the decree ceasing to have jurisdiction—Territorial jurisdiction over subject matter—Pending execution proceedings—Court having territorial jurisdiction can carry on without transfer—Res judicata—exparte order in excution after affixture of notice—Order 9 r. 13—art. 164 Limitation Act.

Where pending proceedings in execution, the court ceased to have territorial jurisdiction over the subject matter of the suit,

Held that having regard to Ss. 37 and 150 C.P.C. the court which acquires jurisdiction over the same can carry on the proceedings without a formal order of transfer from the other court.

An order in execution passed exparte after affixture of notice which the court considered sufficient service operates as resjudicata unless set aside by appropriate proceedings.

Order 9 r. 13 as well as art. 164 Limitation act applies to applications to set aside orders in execution passed exparte as they are decrees within the meaning of the Civil Procedure Code.

L. A. Govindaraghava Aiyar for appellant.

B. Sitarama Rao for respondent.

Miller J.
Tyabji J.
1914, *January* } A. S. No. 76 of 1911.

Where a Zamindar who was the trustee of a temple leased property of the temple for 10 years utilising the lease amount partly for his private expenses and partly for temple expenses, the possession of the lessees must be taken to be that of the trustee on behalf of the temple and cannot be considered adverse to it.

Where before the terms expired the purchaser who bought the property in a court sale in execution of a mortgage decree passed in a suit on mortgage of the property made by the zamindar as his own absolute property and for his private debts got symbolical possession and the lessees stopped all payment of rent to the zamindar, the temple must be deemed to have lost possession and a suit by the trustee to recover 12 years after the last payment was made is barred.

K. Srinivasa Aiyangar and *S. Ramaswami Aiyar* for appellant.

L. A. Govindaraghava Aiyar for respondent.

Sadasiva Aiyar J.
Spencer J.
1914, *January* 26. } S. A. No. 1643 of 1912.

C. P. C. order 2 r. 2 (section 43)—Trespass on two plots—One transaction—Suit for possession of the other.

Suit for possession of one plot of immoveable property bars a subsequent suit for the recovery of another plot when the title to both is the same and the acts of trespass form parts of one transaction.

G. S. Ramachandra Aiyar for appellant.

C. Krishnamachariar for respondent.

Sadasiva Aiyar J.
Spencer J.
1914, *January* 27.

S. A. Nos. 1532 to 1537 of 1911.

Pending an appeal to the Privy council by the landlord from the judgment of the High Court in the suit for enforcing the acceptance of patta, it is not open to him to sue for rent on the footing of the High Court judgment. Under the Rent Recovery Act, it is not necessary for the landlord to prove a fresh tender of patta to the tenant after the judgment in the suit for enforcing acceptance of patta before be can sue for rent.

K. Rajam Aiyar for appellant.

T. Prakasam for respondent.

Sadasiva Aiyar J.
Spencer J.
1914, *January* 27.

S. A. No. 1355 of 1909.

Suit to set aside rent sale—Neither Melvaramdars nor receivers in Melvaramdar's suits necessary parties—Purchaser alone, necessary.

In a suit to set aside a rent sale neither the Melvaramdars nor the receiver appointed in a suit between them is a necessary party. It is enough if the purchaser is made a party.

S. Sundararaja Aiyangar for appellant.

T. R. Venkatrama Sastri for respondent.

Chief Justice
Tyabji J.
1914, *January* 28.

O. S. No. 7 of 1913.

Mahomedan Law—Gift by father to minor son—Registration insufficient to confer title.

Where a Mahomedan father makes a gift of immoveable property to his minor son by a registered leed and stipulates that he will collect the rents and enjoy the same for his life and that the

son is to enjoy the property with rights of alienation after his life, and nothing further appears, though on the face of it is an absolute gift the gift is invalid. Some act of possession on behalf of some acknowledgment of the right of the minor must be proved to show that the deed was given effect to.

C. V Ananthakrihna Aiyar for appellant.

Thirunarayanachari for respondent

Sankaran Nair J.
Ayling J.
1914, *January*

C. M. A. Nos. 206 & 207 of 1912.

Partnership—Dissolution other—One of the defendants claiming against plaintiff and other defendants—Withdrawal of suit by plaintiff—Defendants' claims not put an end to—Order 23 R. 1 C. P. C.

In a suit for dissolution of partnership and for accounts, where one of the defendants claims sums of money from the plaintiff and the other defendants, withdrawal of the suit by the plaintiff under Or. 23 r. 1 will not prevent him from prosecuting his claim in the same suit.

V. Ramesam and *J. Venkatram* for appellant.

V. Ramadas for Respondent.

Sankaran Nair J.
Ayling J.
1914, *January*

C. M. P. No. 1223 of 1911.

Estates Land act S. 3 Cl. 5, Cl. 7 (2)—Ijaradar—"Landholder."

An ijaradar is a landholder within the meaning of S. 3 Cl. 5. A tenant let into possession of the land in July 1907 cannot be a tenant of old waste within the meaning of S. 3 Cl. 7 (2) as the letting contemplated by S. 3 Cl. 7 (2) is a letting after the passing of the Act.

P. Somasundaram for petitioner.

T. Prakasam and *T. Ramachandra Rao* for respondent.

NOTES OF RECENT CASES.

Sadasiva Aiyar J.
Tyabji J.
1914, *anuary* 28.

C. M. P. 924 of 1913.
in
S. A. No. 1333 of 1912.

Archaka or Gurukkal office in a temple—Inalienability of—Right of female to succeed and do service by deputy.

Gurukkal or Archaka office in a temple requires special and personal qualifications, and as such the office is inalienable in law and females cannot succeed to such offices, nor can they be allowed to do the duties of the office by deputies.

M. B. Doraiswami Aiyangar for petitioner.

S. T. Srinivasagopalan for Respondent.

Sankaran Nair J.
Ayling J.
1914 *January* 29.

C. M. A. No. 189 of 1912.

Limitation Act IX of 1908 S. 31—'Mortgage', meaning of—Hypothecation of 1867.

The word 'mortgage' in S. 31 of the Limitation Act IX of 1908 includes hypothecations executed before the Transfer of Property Act.

N. Rajagopaachari for appellant.

T. Rangachari and *T. M. Krishnaswami Aiyar* for respondent.

Sankaran Nair J.
Sadasiva Aiyar J.
1914, *February* 3.

S. A. No. 39 of 1911.

Malabar Law—Beds of non-navigable and non-tidal streams—Vest in riparian proprietors.

Per Sankaran Nair J. (*Sadasiva Aiyar* J. dissenting).

Beds of non-tidal and non-navigable streams vest in riparian proprietors in accordance with the English rule and not in the Government.

K. P. M. Menon for appellant.

The Government Pleader for respondent.

Sankaran Nair J.
Ayling J.
1914, *February* 4.

C. M. A. No. 108 of 1913.

C. P. C. S. 73—Decree-holder held not entitled to rateable distribution on objections by judgment debtor—No appeal.

An order holding a decree-holder disentitled to rateable distribution on the objections of the judgment debtor is not an order in execution between the parties from which an appeal would lie.

N. Chandrasekhara Aiyar for appellant.

L. A. Govindaraghava Aiyar for respondent.

Sankaran Nair J.
Ayling J.
1914, *February* 5.

C.M. S. A. No. 37 of 1913.

Limitation Act, art. 181—C. P. C. S. 144—Application under—Limitation applicable—Fresh starting point from second appeal—Decree.

An application for restitution more than 3 years after the date of the decree by which a party became entitled to it but within 3 years of the Second appeal decree is within time. The article applil cable to such applications is Art 181.

B. Sitarama Rao for appellant.

K. P. Laxman Rao for respondent.

NOTES OF RECENT CASES.

Sankaran Nair J.
Ayling J.
1914 *February* 4.

C. M. A. No. 108 of 1913.

In an appeal from an order refusing rateable distribution to the appellant on the opposition of the judgment debtor, a preliminary objection that no appeal lay under the Code of Civil Procedure from an order passed under S. 73 C. P. C. was upheld and the contention of the appellant that the question related to the execution, discharge or satisfaction of the decree and arose between the "parties to the suit" (not being between rival decree-holders) within the meaning of S. 47 of the Code was negatived.

Mr. N. Chandrasekhara Aiyar for Appellant.

Mr. L. A. Govindaraghava Aiyar for Respondent.

Sadasiva Aiyar J.
Spencer J.
1914, *February* 5.

S. A. No. 2138 of 1910.

Sadasiva Aiyar J. The enfranchisement of the Inam by the Inam commission has the same effect as a permanent settlement of the inam lands under Regulation XXV of 1802 and the Government is not entitled to levy any additional revenue from the inam lands other than the quit rent imposed at the time of the enfranchisement either by way of assessment or by way of Royalty for any stones or minerals excavated in the inam lands. The inamdar becomes the absolute owner of the inam lands and the soil as distinguished for a mere right to enjoy the surface of the lands and profits.

Spencer J. The enfranchisement of the inam does not confer on the grantee any right to the minerals and stones in the inam lands and the Government's right to levy assessment or Royalty for stones quarried and minerals excavated is not thereby lost. This being a prerogative of the crown cannot be lost by prescription or limitation.

Government Pleader for Appellant.

T. R. Venkatarama Sastri for Respondent.

Sankaran Nair J.
Ayling J.
1914, *February* 5. — C. M. S. A. No. 200 of 1913.

C. P. C. Ord. 34 rr. 5 and 6—'Such sale', meaning of—May be private sale with the consent of all judgment-debtors liable for the decree amount and the decree holder.

'Such sale' in C. P. C. Ord 34 rr. 5 and 6 may be even private sale with the consent of all the judgment debtors liable for the decree-amount. Any judgment-debtor liable for the decree amount who has not consented to the private sale cannot be proceeded against for the balance of the decree-amount.

T. Narasimha Aiyangar for Appellant.

R. N. Aiyangar and *P. Ramanathan* for Respondents.

Wallis J.,
Ayling J.
1914 *March* 10.

C. M. P. 442 of 1914

Consent order—Fixing time to furnish security—Court's power to extend time without consent.

Pending a second appeal, the petitioner applied for stay of execution and by consent execution was stayed on the petitioner giving sufficient security in the shape of immovable property by a fixed date. The petitioner failed to give security by the time and applied for extension of time to give security. Held per Wallis J. An order by consent cannot be varied except by consent and the Court has no power to extend the time (1) 1891 W. N. 170, *Glynn* v. *Bell* [1] followed.

Per Ayling J.—while doubting if the court had power preferred to dismiss the application on the merits.

N. S. Narasimhachari for the Petitioner.

T. Ramachandra Rao for the Counter Petitioner.

Tyabji J.,
Spencer J.
1914 *March* 11.

A. S. No. 213 of 1911.

C. P. C. O. 21, rr 58 & 63. Limitation Act, S. 11.

A claim was preferred to certain property attached in execution of a decree. The claim was disallowed but the attachment was raised by the same order on an objection raised by the judgment-debtor that the property was not liable to be sold in execution. The decree holder preferred an appeal making the judgment-debtor alone a party and the High Court restored the attachment so far as the judgment-debtor was concerned. In a suit brought by the claimant more than one year afterwards to establish his right to the property, it was pleaded that the suit was barred by Art. 11 of the Limitation Act. *Held* that the attachment having been raised the claimant need not have sued and the suit was not barred.

S. Srinivasa Iyengar for the Appellant.

S. Subramania Iyer for the Respondent.

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(1) 1887 6 L. J. Ch. 201.

Wallis J.,
Ayling J.
1914 *March* 10.

L. P. A. 4 of 1914.

Interest—Demand for larger amount—Admission of liability for lower—No payment or tender—effect of.

Where the plaintiff called upon the defendant to pay ⅓ of the decree amount which the plaintiff had paid and in respect of which the defendant was bound to contribute, the defendant admitted his liability to the extent of a fourth but neither paid the same, nor when the suit was brought tendered it in Court *Held*: that the defendant was not exempted from paying interest on the fourth which he was bound to pay.

K.V. Krishnaswamy Iyer for *S. Muthiah Mudaliar* for Appt.

T.V. Gopalaswamy Mudaliar for Respondent.

Wallis J.,
Ayling J.
1914 *March*, 9.

L. P. A. 170 of 1912.

C. P. C., Ss. 50, 52—Decree against son as legal representative—Property passing into the hands of son's heirs—Executability of decree.

Where in a suit instituted before the passing of the New Civil Procedure Code a decree was made by the High Court in appeal (after the coming into force of the new Act) against the sons as legal representatives of their father (a Hindu.)

Held that the decree could, in the absence of evidence showing that the debt was immoral or illegal be executed against the family property in the hands of the son. The fact that property has subsequently passed by reason of the death of the son into the hands of the separate heirs of the son does not exempt the property from liability.

N. R. K. Tathachariar for Appellant.

K. B. Ranganatha Aiyar for Respondent.

NOTES OF RECENT CASES.

Ayling J.
1914, *March* 17. } C. R. P. 454 of 1913.

Madras Estates Land Act, S. 111, suits to set aside sales. Jurisdiction, Civil Courts.

A suit to set aside a sale held under S. 111 of the Estates Land Act by the landlord of his ryot's holding for arrears of rent, on the ground that the sale is illegal lies in a Civil Court and not before the Collector.

Mr. S. Ramaswamy Iyer for the petitioner.

Sadasiva Aiyar J.
Seshagiri Aiyar J.
1914, *March* 18. } C. M. A. 186 of 1911.

Estates Land Act, Ss. 3, 8.—Grant of village—Waste land forming part—Estate nevertheless—Surrender—Not acquisition by itself—Waste land ryoti land.

A village granted in Inam is none the less an estate because a portion of it is waste land at the time of the grant. Such waste is ryoti land.

Per Sadasiva Aiyar, J.—The landlord cannot be said to have Kudivaram interest in waste land. He cannot also be said to acquire the Kudivaram therein when it is found that the tenants to whom it was let out from time to time had themselves no Kudivaram right; surrender and relinquishment are not modes of acquisition recognised in the exception to S. 8.

Per Seshagiri Aiyar, J.—The grant of waste land involves the grant of the Kudivaram also to the grantee but where it forms part of an estate, it will be ryoti land nevertheless and it will cease to be so only when the Kudivaram is acquired subsequently to the grant of the estate. Surrender by itself is not acquisition within the meaning of the exception to S. 8 of the Act.

M. O. Parthasarathy Aiyangar and *V. Ramesam* for Appellant.

S. Srinivasa Aiyangar and *V. Ramdoss* for Respondents.

Sadasiva Aiyar, J.
Seshagiri Aiyar, J. } S. A. 425 of 1912.
1914, *March* 18

Estates Land Act—Jurisdiction—Suit for joint possession—A co-owner purchasing Kudivaram—Suit by the other for possession on the ground of forfeiture—A suit for joint possession will not lie in Revenue Courts.

Where one of the co-owners of an estate sued the other who had purchased the Kudivaram interest in the land for possession on the ground that the latter had forfeited his Kudivaram interest by building on the land.

Held that the suit as framed was not maintainable in the Revenue Court.

Wallis, J.
Sadasiva Aiyar, J. } Cr. M. P. 428 of 1913.
1914, *March* 18.

Criminal Procedure Code, Ss. 195, 476, Illegal evidence, Police report, Evidence in Counter-case, Preliminary enquiry whether necessary.

Sanction based on a police—report is illegal 10 Mad. 232 followed.

But where there is other material *e.g.*, where the evidence for the complainant had been taken in a counter-case, and a decision had been come to upon it, the sanction to prosecute him for an offence under S. 211 cannot be said to be based on illegal evidence.

Per Sadasiva Aiyar J.—Where two Courts had confirmed the sanction, the appeal should be dismissed as a matter of practice.

No preliminary enquiry is compulsory under S. 476 or under S. 195. Sanction need not necessarily be based on legal evidence.

A. Saminatha Aiyar for the Petitioner.

The Public Prosecutor.

Wallis, J.
Sadasiva Aiyar, J. } L. P. A. 92 & 97 of 1913.
1914, *March* 20.

Suits—Maintainability—Some only of the trustees—Managing trustees.

The plaintiffs, the managing trustees of a temple, being only some of the trustees of a temple brought a suit for certain mirasi dues from the defendants who had executed muchilikas to the plaintiffs.

Held the plaintiffs being only some of the trustees of the temple could not maintain the suit without joining their co-trustees. 3 Mad. p. 234 followed. 24 M. L. J. p. 75 dissented from if it was meant to go further than 3 Mad. p. 234.

In this case their Lordships allowed the other trustees to be added at that stage.

C. V. Anantakrishna Aiyar and *A. S. Viswanatha Aiyar* for the Appellants.

B. Somayya for the Respondents.

Tyabji, J.
Spencer, J.
1914 ***March*** 24.

S. A. 1498 of 1911.

Mopla—North Malabar—Law governing—Whether Mahomedan Law or Marumakkathayam—Question of fact.

Whether a particular individual or family of the Mopla community of North Malabar is governed by the Mahomedan Law or by the Marumakkathayam law is a question to be determined upon the facts of each case. In so determining the question, the court may take judicial notice of the fact that many families in North Malabar have adopted Marumakkathayam usages.

T. R. Ramachandra Aiyar for Appellant.

T. K. Govinda Aiyar for Respondent.

Ayling, J.
Seshagiri Aiyar, J.
1914, ***March*** 25.

A. S. 13 of 1908.

Co-owners—Suit for share of profits against managing co-owners, without prayer for general partition—maintainability of--Presents--Suit for account against agent—Agent's death, effect of.

A suit for account brought by the principal against his agent can be continued against his legal representatives.

Suit for a share of profits recovered by the managing co-owner is not liable to be dismissed on the ground that the suit does not include a prayer for partition of the property itself. Presents paid to vakil's clerks &c., are debitable against the principal as such payments are made in the usual course of business.

K. Srinivasa Aiyangar for Appellant.

C. V. Anantakrishna Aiyar for Respondent.

Spencer, J.

1914, *March* 26.

C. M. P. 710 and 711 of 1914.

Letters Patent Appeal—Security for Costs—High court Appellate Side Rule 48 (3), ultra vires.

A second appeal was dismissed by a single judge of the High Court under O. 41, R. 11 C.P.C. Pending a Letters Patent appeal against the decision, the respondent applied for security for his costs. On a preliminary objection being taken that the provision for security for costs does not apply to Letters Patent appeals ***Held***, distinguishing 27 Mad. p. 121, that though the provisions of the Civil Procedure Code do not apply, Rule 48 (3) of the High Court Appellate Side Rules applies and such an application will lie. Rule 48 (3) does not restrict the right of appeal given by cl. 15 of the Letters Patent and consequently is not ***ultra vires***. 26 M. L. J. p. 227 distinguished.

W. Barton for the Petitioner.

V. C. Seshachariar for the Respondents.

NOTES OF RECENT CASES.

Wallis, J.
Sadasiva Aiyar, J. A. S. 213 of 1909.
1914, *March* 31.

Limitation Act, XV of 1877, S. 20, (1)—" *By an agent duly authorised in this behalf* " *whether includes a person whom debtor permits to pay off the debt.*

Payment of interest by a person whom the debtor permits to pay off the debt and recover the bond is not "payment of interest as such by an agent duly authorised in this behalf" within the meaning of S. 20 (1) of the Limitation Act and will not save limitation as such.

C. Krishnama Chariar for the Appellant.

S. Srinivasa Aiyangar for Respondents.

Tyabji, J.
Spencer, J. S. A. 299 of 1911.
1914, *March* 31.

Hindu Law—Alienation—Expenses incurred in defending criminal prosecution—Binding nature on sons.

An alienation of joint family property by the father for the purpose of defending himself in a criminal prosecution is binding on the son's interest in the family property. *Beni Ram* v. *Man Singh* [1] foll.

T. Narasimha Iyengar for Appellant.

S. Muthiah Mudaliar for Respondents.

Sankaran Nair, J.
 C. S. No. 448 of 1912.
1914, *April* 9.

Original Side—Practice—Counsel instructed by Vakil.

When counsel appears instructed by Vakil, a special fee may be allowed for the counsel if the case is certified by the presiding Judge to be a fit one for employing counsel.

(1) (1911) I. L. R. 34 A.

C. P. Ramaswami Aiyar for Plaintiff.

M.A. Tirunarayana Chariar instructed by *V. Parthasarathy Aiyangar* for the Defendant.

Hon'ble the Advocate-General on behalf of the Bar.

J. Krishna Rao for the Bar Association. *Chamier* for Attorney associaton.

Ayling, J.
Oldfield, J.
1914, *April 16.*
C. M. A. 8 to 12 of 1913.

Madras Estates Land Act I of 1908. S. 3 (2), "estate," what Constitutes—Inam village.

The fact that ryots in an inam village have no occupancy right and that the kudivaram in the lands which are the subject matter of the suit was in the inamdar was not sufficient to lead to the inference that the lands do not form part of an estate. In order to raise that inference, the inamdar should prove one of two things:—(1) That he was himself the cultivating ryot of all the cultivable lands in the village so as to make him the person owning the kudivaram in the whole village at the date of the original grant or (2) that he aquired the Kudivaram right in the lands in question from a third person subsequent to the date of the grant in his capacity as an inamdar.

V. Ramdoss for the Appellants.

L. A. Govindaraghava Aiyer and *P. Nagabhushnam* for the Respondents.

Wallis J.
Sadasiva Aiyar, J.
Spencer, J.
1914. *April*, 16
Cr. A 50 & 51 of 1914.

Criminal Procedure Code, Act V of 1898, S. 195, cl. 6—Appeal against an order granting sanction to prosecute dismissed, computation of 6 months—When it commences from.

The computation of 6 months under S. 195 cl.6. is only from the date of the order of the appellate Court granting sanction when the lower Court has refused the same and when an application to revoke the sanction is made to the appellate Court from the time when the application is dismissed.

The Public Prosecutor for the Crown

V. Ryru Nambiar and *K. Govinda Marar* for the Accused.

NOTES OF RECENT CASES.

Seshagiri Aiyar, J.
1914, *April* 17.

C. R. P. 477 of 1913.

Landlord and Tenant—Indian Evidence Act I of 1872, S, 116—Estoppel—Plea of benami whether can be set up.

Where a tenant executes a lease deed, he is not estopped from pleading that the person in whose name the document was executed was only a benamidar. S. 116 of the Evidence Act does not preclude the tenant from showing that the person to whom the rent deed was executed was only a benamidar.

Kuthaperumal v. *Secretary of State*[1] *Kuppa Konah* v. *Thirugnana Sambanda Pillai* [2] followed.

Jainarain Ghose v. *Kadambai Dasi* [3] referred to.

C. A. Seshagiri Sastri for the Petitioner.

K. V. Krishnasawami Aiyar for the Respondent.

Miller and
Sadasiva Aiyar, J.J.
1914, *April* 20.

S. A. 2617 of 1912.

Limitation Act, Art. 123—Native Christians—Suit for partition.

Where a Native Christian woman sued her sons who were in possession, for partition and delivery to her of her share in the property of her husband who died intestate and there was no administrator for the estate, *Held* that Art. 123 was not applicable to the case. 34 M. 511 foll.

K. V. Krishnaswami Aiyar for Appellant.

Dr. S. Swaminathan for Respondent.

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1. I. L. R. 30. M. 345.
2. I. L. R. 31 M. 461.
3. 7 B. L. R. 723 ref.

Chief Justice and Seshagiri Aiyar, J. 1914, *April* 21. — A. S. 44 of 1911 and 245 of 1910.

Limitation Act, Art. 91, 144—Suit to recover possession of properties improperly alienated by Ejaman of Aliyasantana family.

A suit brought to set aside an alienation by the Ejaman of an Aliyasantana family and to recover possession of the properties is, governed by Art. 144 of the Limitation Act and not by Art. 91.

Art. 91 is applicable only when the document sought to be set aside is executed either by the plaintiff or some person through whom the plaintiff is claiming.

B. Sitaram Rao for Appellant.

K. Narayana Rao for Respondent.

Miller and Sadasiva Aiyar, JJ. 1914, *April* 21. — S. A. No. 2215 of 1912.

Service inam — Surati service in temple—Alienation—Right of Dharmakarta to sue.

The plaintiff, Dharmakarta of a temple sued as such the defendant, who was an alienee from a dancing girl of certain service inam lands which were confirmed in her name by the inam title-deed in 1860 subject to her rendering *Surati* (fanning etc.) service in the temple. The suit being for a declaration to have the sale declared illegal, and for recovery of possession of the said lands.

Their Lordships held that the Dharmakarta could not maintain any suit against the alienee though the temple had along enjoyed the benefit of the Surati service.

V. Ramesam for Appellant.

P. M. Srinivasa Aiyangar and *P. Nagabushanam* for Respondents.

Wallis and Oldfield, JJ.
1914, April 22.

S. A. 2044 of 1912.

Hindu Law—Impartible estate—Pledge of jewels with the previous last male holder—Liability of widow.

The widow who succeeds as the heir at law of her husband the previous proprietor of an impartible estate is not liable in respect of a deposit of jewels made by a person with the previous holder. If the jewels are traced to the widow, she will be personally liable for any conversion by her.

K. Srinivasa Aiyar and ***A. Krishnaswami Aiyar*** for Appellants.

L. A. Govindaraghava Aiyar and ***L. A. Venkataraghava Aiyar*** for Respondents.

Wallis and Oldfield, JJ.
1913, ***April*** 24.

C. M. A. 253 of 1913.

Limitation Act, 182 Cl. (6)—Revenue sale of mortgaged properties—Surplus proceeds with Collector—Application by mortgagee decree-holder to send for the surplus and payment to him—Proper application.

Where the surplus proceeds in a revenue sale of mortgaged properties are with the Collector an application by the mortgagee decree-holder for execution praying that the proceeds may be sent for and paid over to him is an application in accordance with Law and will save Limitation under Art. 182 Cl. (6).

Miller and Sadasiva Aiyar, JJ.

S. A. 1124 of 1912.

Limitation Act—Art. 12, 166—Death of Judgment-debtor—Legal representatives on record—Minor—Sale—Nullity.

Where a decree was obtained and after the decree the judgment-debtor died and two persons were brought in as his legal representatives on record for the purpose of execution and one of them having no interest in the property and the other

being a minor and when the proceedings were carried on against the minor as if he were a major by the decree-holder and the auction purchaser knowing that he was a minor.

Held that the sale in pursuance of such execution proceedings was a nullity and that neither Article 12 nor Article 166 of the Limitation Act, applied I. L. R. 25 B. 337 distinguished and I. L. R. 31 A. 572 followed.

K. Srinivasa Aiyangar and *V. Ramasam* for Appellants.

Hon'ble B. N. Sarma for Respondent.

NOTES OF RECENT CASES.

Present:—Lord Chancellor, Lords Dunedin, Moulton and Sumner.

Sheikh Khaliluddin Ahmed — *Appellant.**

v.

Musammat Banni Bibi — *Respondent.*

On Appeal from the High Court at Allahabad.

Registration Act XVI of 1908, *Ss.* 32 *and* 87—*Presentation —Mojibunnisa* v. *Abdur Rahim* (*I. L. R.* 23 *All.* 233 *P. C.*)

This was a petition for special leave to appeal from a decision of the High Court confirming the judgment of the Subordinate Judge of Barielly.

Musammat Banni Bibi wanted money to satisfy a pre-emption decree. Her cousin Niaz Bibi lent her the amount which was deposited in the Court and the property purchased in possession of which she ever since remained. A deed was executed by her. The stamp paper was bought by her, the deed was presented at the Registry by her husband. The Registrar sent the Departmental Registrar to the lady's house. He saw the money paid to her, she being identified by her own son and brother-in-law.

She acknowledged the execution of the deed. It was subsequently registered at the Registry.

Two years after Niaz Bibi transferred the said debt standing against Banni Bibi to her nephew, Khaliluddin Ahmed, who sued Banni Bibi for the amount. The defence, *inter alia*, was that there was no valid presentation of the deed to the Registrar. The Subordinate Judge found himself bound by the ruling of the P. C. in *Mojibunnisa* v. *Abdur Rahim* [1].

On Appeal to the High Court the decision of the Lower Court was upheld, but there was no order as to costs. Leave to appeal to the Privy Council being refused the petitioner applied for special leave to appeal.

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* April 2, 1914.

1. I. L. R. 23 A 233.

Loundes and A. Majid for the Petitioner contended that the ruling of the P. C. in *Mojibunnisa's* case was never meant to apply to cases like the present. There must have been presentation by the lady. The question is of general interest and involves substantial points of law as to what would amount to presentation by a pardanashin lady. [*Lord Chancellor*: We will grant you special leave to appeal.]

Solicitors for the petitioner *Barrow, Rozario and Nevill.*

Present:—Lord Chancellor, Lords Dunedin Shaw, Moulton and Parker.

Muza Mohammed Jawad — *Appellant.*

v.

The King-Emperor and others — *Respondents.*

On Appeal from the Chief Court of Lower Burma.

Contradictory statements of complainant—Hearsay statements admitted—Irrelevant matters received—No clear proof—Benefit of doubt.

This was a petition for special leave to appeal from a judgment of the head-quarters' special power Magistrate of Hanthawady in Lower Burma by which the petitioner was sentenced to three years' rigorous imprisonment for perjury.

On June 13, 1910, Ma Pu, a Burman Budhist girl who had worked in a cigar factory applied to the Sub-Divisional Magistrate of Prome for a maintenance order for herself and her infant child against the petitioner alleging that he was the father of her child. The application was registered for want of proof on July 5, 1910. On August 26, 1910, she was prosecuted for perjury and sentenced to six weeks' imprisonment. On Sept. 10, 1910, she appealed to the Sessions Judge who had received various affidavits sworn *inter alia* by the members of the Young Burman Association who were desirous of shielding Ma Pu, and who subsequently ordered Ma Pu's re-trial on Oct. 6, 1910. Her trial took place on January 16, 1911. She was

acquitted, the Magistrate believing all she said. The petitioner who was a Muslim and Persian subject was ordered to be prosecuted for perjury during Ma Pu's trial.

Ma Pu alleged that petitioner several times made immoral overtures to her and on one occasion, had had connection with her by force, a fact which she did not mention to her sister even. After sometime she yielded to his proposal to marry him who gave her £10 by way of dower. They went together to the jungle apicnicing and then lived together as man and wife for two months. She getting in the family way came back to her sister's house and gave birth to the child in question.

On the question of marriage and the persons who took part in it, Ma Pu made contradictory statements on June 13, March 17, and June 23, 1910. For the marriage taking place there was only one witness who was her sister and against the marriage taking place there were some six witnesses. Those who had seen Ma Pu coming into the house of the petitioner and going out therefrom numbered six and their statements were contradictory. Those who deposed to the contrary numbered half-a-dozen. On the question of going to a picnic the number of witnesses for and against was nearly equal. A great many irrelevant matters were admitted and a good many hearsays too, such as the statement of Ma Pu to her employer in the cigar factory where she had previously worked. The Magistrate who was a Burman however, sentenced the petitioner to three years' imprisonment for each of the three acts of perjury under S. 195 of the Indian Penal Code, the sentences to run concurrently. This happened on Aug. 4, 1911. He appealed to the Sessions Judge on Sep. 4, 1911, who reduced the sentence to three years' imprisonment. On application for revision of the said order of the Sessions Judge, the Chief Court did not allow the petitioner to read the record as the judges intimated that they had already read it, but reduced the sentence to two years' imprisonment.

The petitioner was struck off the rolls of the Advocates of the Chief Court of Lower Burma.

This petition was made against the order of the Chief Court striking the petitioner off the Rolls and against the said conviction.

F. E. Smith, K. C., McCarthy, and Majid appeared for the petitioner, April 20, 1914 and contended that there was no evidence against the petitioner which could sustain his conviction. No jury could have convicted. He was not able to give evidence on his own behalf owing to the Indian practice. His case was covered by Dillets' case (12 A. C. 456).

Lord Chancellor : We are not sitting as a Court of Criminal Appeal. You must show non-judice.

Lord Shaw : It is the practice of this board not to interfere with concurrent findings of fact by two Lower Courts.

It does not apply to criminal cases.

Lord Chancellor : We will not give leave to appeal.

Petition refused.

Solicitors for the petitioner : *Bramall and White.*

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